87-2005

Supreme Court, U.S.
FILED
APR 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

EVAN J. HENRY,

Petitioner,

v.

STANLEY M. MROSAK
and
DELORES A. MROSAK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Evan J. Henry
Rt. 1, Box 60
Winona, Minnesota 55987
(507) 452 9338

Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Where petitioner appeared pro se (except before the Supreme Court of Minnesota where he was represented by legal counsel), did petitioner have the constitutional right founded in due process and equal protection, to appear in his own defense without having to obtain the professional advice of a surveyor or attorney prior to trial?[1/]

2. Was petitioner's constitutional right not to be deprived of property except under due process of law, violated by the Minnesota Court of Appeals where it disagreed with the trial court's Award of attorney fees based on a finding of gross negligence only[1/] but then nevertheless affirmed the award based on its own finding of bad faith?[2/]

3. Was petitioner's constitutional right not to be deprived of property except under due process of law, violated by various findings and conclusion in the trial court's Order and Decree of Registration as affirmed by the Minnesota Court of Appeals to wit:

1/ See Appendix 61a, 65a-70a, 30a-31a;
2/ See Appendix 15a, 27a-33a.

a) Finding No. 11[1]: That Auditor's Plat No. 4 is not a surveyed plat?

b) Finding No. 12[1]: That the boundary lines of Lots 16, 17 and 18 of Auditor's Plat No. 4, cannot be located definitely and accurately by a competent surveyor?

c) Finding No. 17[1]: That there is a "gap" between the southwesterly line described in the Application and the northeasterly line of Lot 18, Auditor's Plat No. 4 . . . and that if any part of Lot 18 lies within the land described in the Application, applicants have acquired title thereto by adverse possession?

c) Conclusion[1]: That applicants property be described by metes and bounds without identifying it as being Lot 17 of Auditor's Plat No. 4?

4. Did respondents' abandonment of Auditor's Plat No. 4 lack proper foundation?

5. Did the hearing on respondents' motion for an order and decree of registration of November 12, 1986[2], lack fair hearing under

---

1/ See Appendix 34a, 36a-41a, 15a, 18a.
2/ See pages 15, 16.

due process of law?

6. Does the case only affect petitioner and respondent as the trial court has indicated[1/] or does it have wider implications?

PARTIES IN THE SUPREME COURT OF MINNESOTA AND MINNESOTA COURT OF APPEALS

1) William A. Lindquist
63½ West Fourth Street
Winona, Minnesota 55987
(507) 452 4614
Attorney Registration
No. 63563

Attorney for Petitioner
before the Supreme Court
of Minnesota

2) Evan J. Henry
Rt. 1, Box 60
Winona, Minnesota 55987
(507) 452 9338

Petitioner Pro Se before
the Minnesota Court of
Appeals

3) ROSERIDGE ATTORNEYS
Larry K. Houk
1611 W. County Road B
Suite 218
Roseville, Minnesota 55113-4053
Attorney Registration
No. 47430

Attorney for Respondents

1/ See pages 9, 10.

TABLE OF CONTENTS

Questions Presented for Review	i
Parties in the Supreme Court of Minnesota and the Minnesota Court of Appeals	iii
Opinions Below	2
Jurisdictional Statement	2
Constitutional Provisions Involved	2
Statement of the Case	4
Reasons for Allowance of the Writ	23

1. By granting respondents' application without identifying the property as Lot 17, Auditor's Plat No. 4, the courts below have destroyed the marketability of petitioner's property and violated his constitutional right not to be deprived of property except under due process of law.

2. By awarding attorney fees to respondents under the cirumstances and in contradiction to the finding of the trial court where no bad faith was found, the courts below violated petitioner's constitutional right not to be deprived of property except under due process of law.

3. This case has wide implications for all who already are or who may find themselves in similar circumstances.

CONTENTS OF APPENDIX
(In inverse chronological order)

Notice of Sheriff's Execution Sale Real Property, April 14, 1988 (Petitioner's Lot 18) 1a

Order of the Supreme Court of Minnesota filed January 28, 1988 4a

Petition for Review of Decision of the Minnesota Court of Appeals, December 17, 1987 5a

Opinion of the Minnesota Court of Appeals filed November 17, 1987 15a

Order and Decree of Registration of Tenth Judicial District Court of the State of Minnesota filed December 16, 1986 34a

Order of the Tenth Judicial District Court of Minnesota filed December 16, 1986 44a

Motion for Amended Findings and Notice of Motion, March 25, 1986 (re award of attorney fees) 46a

Legal opinion of William A. Lindquist, Attorney at Law, March 15, 1986 51a

Supplement to Motion for Amended Findings or in the Alternative a New Trial, March 6, 1986 54a

Motion for Amended Findings or in the Alternative a New Trial, February 24, 1986 and Notice of Motion 58a

Order for Judgment and Memorandum of Tenth Judicial District Court of Minnesota filed Febrary 28, 1986 (award of attorney fees) 61a

Findings of Fact and Interlocutory Order Determining Boundaries of Tenth Judicial District of Minnesota filed February 5, 1986 74a

Maps and Surveys:

Survey of respondents' property by Lots Survey Company, August 12, 1983 (Respondents' trial court Exhibit 2) 80a-81a

Auditor's Plat No. 4 (Respondents' trial court Exhibit 5) 82a-83a

N 1/2 Sec. 4, T. 31, R. 24 (Respondents' trial court Exhibit 6) 84a-85a

N 1/2 Sec. 4, T. 31, R. 24 showing County Surveyor's measurement of its East line as 2,725.748 feet (Respondents' trial court Exhibit 8) 86a-87a

Drawing by County Surveyor of Lots 12 through 20, Auditor's Plat No. 4, showing alleged errors in plat and Lots 13, 14, and 20 as having been registered. (Respondents' trial Exhibit 9) 88a-89a

NE 1/4 of Sec. 4, T. 31, R. 24 showing the location of the North line of Auditor's Plat No. 4 as lying 23.21 chains (1,531.86 feet) North of the SE corner of Lot 2 per original U.S. Government survey and subsequent deeds. (From petitioner's APPELLANT'S APPENDIX TO BRIEF in Minnesota Court of Appeals) 90a-91a

Excerpt from Auditor's Plat No. 4 Showing its North Line 92a-93a

Minn. Stat. 549.21 94a

Minn. Rule 301. Presumptions in General in Civil Actions and Proceedings 94a

Minn. Rule 401. Definition of "Relevant Evidence" 94a

TABLE OF CITATIONS

Cases

Dittrich v. Ubl (1944) 216 Minn. 396; 13 N.W. 2d 384 — 29

Flannigan v. Pomeroy (1902) 85 Minn. 264; 88 N.W. 761 — 24

U.S. v. Certain Parcels of Land in Prince George's County, Md. (Dist. Ct. 1941) 40 F. Supp. 436 — 24

Constitution

U.S. Constitution, Amendment V — 2

U.S. Constitution, Amendment XIV — 2

Federal Statute

28 U.S.C. 2101(c) — 2

Minnesota Statutes

505 — 18

549.21 — 5, 12, 21, 24

Chapter 991, revised Laws of 1905 — 5

Chapter 32, Laws of 1911 — 5, 25

Minnesota Rules of Evidence

301 and 401 — 19

Minnesota Appellate Court Rule

104.01 — 16

No.

IN THE
SUPREME COURT OF THE UNITED STATES

EVAN J. HENRY,

Petitioner,

v.

STANLEY M. MROSAK
and
DELORES A. MROSAK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

The petitioner, Evan J. Henry, respectfully prays that a writ of certiorari be issued to review a decision by the Minnesota Court of Appeals which affirmed two decisions of the Tenth Judicial District of the State of Minnesota, and where the Supreme Court of Minnesota denied petitioner's petition for review of the Minnesota Court of Appeals' decision.

OPINION BELOW

Both the Order of the Supreme Court of Minnesota[1/] which denied petitioner's petition for review and the Opinion of the Minnesota Court of Appeals[2/], are filed C5-87-499 by the Clerk of Appellate Courts, State of Minnesota. The opinion of the Minnesota Court of Appeals was filed November 17, 1987 and is reported (Minn. App. 1987) 415 N.W. 2d 98. The order of the Supreme Court of Minnesota was filed January 28, 1988.

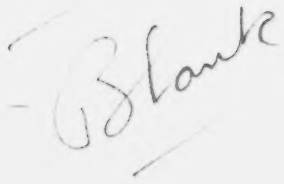
JURISDICTIONAL STATEMENT

Petitioner seeks review of the above order and opinion. The jurisdiction of this Court is authorized by 28 U.S.C. 2101 (c).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

1/ See Appendix 4a
2/ See Appendix 15a



STATEMENT OF THE CASE

1. On October 28, 1983, respondents, who own real estate on the shore of Crooked Lake, City of Coon Rapids, Minnesota and which for over fifty years has been described as Lot 17 of Auditor's Plat No. 4[1/], Anoka County, Minnesota, filed an application to register said property under only a metes and bounds description and without it being referred to as said Lot 17. Petitioner-Appellant who owns adjoining Lot 18 in said plat, opposed such registration by claiming subject property was improperly described, that the description proposed for registration purposes conflicted with that shown for said lot in the auditor's plat, and that respondents had failed to join various other property owners similarly affected by such registration.

2. On February 6, 1985 following a long and protracted period of negotiation that got nowhere, respondents commenced court action to register their property and to

---

1/ See Appendix 82a-83a

seek attorney fees from appellant for allegedly acting in bad faith in opposing the application pursuant to Minn. Stat. 549.21.[1/]

3. On January 27, 1986, trial commenced in the Tenth Judicial District Court of Minnesota before the Hon. Robert B. Danforth where respondents introduced various exhibits including a survey of respondents' property by Lot Surveys Company (Raymond A. Prasch) dated August 12, 1983, Exhibit 2[2/] (T. 44); Auditor's Plat No. 4, Exhibit 5[3/] (T. 51) which included on its face a certificate dated June 29, 1934 by a Wayne L. Ridge, County Surveyor, attesting to having surveyed and platted the property described in the plat and to its correctness, a certificate dated June 29, 1934 by an E.A. Carlson, County Auditor, attesting to having designated the plat "Auditor's Plat No. 4" pursuant to Chapter 991 of the revised laws of 1905 and as amended by Chapter 32 laws of 1911, and a certificate by the Supervisor of Deeds that the plat was recorded in Book E of Plats, page 16, on July 17, 1934.

1/ See Appendix 4a, 2/ See 80a-81a; 3/ 82a-83a.

As the trial progressed, Roland W. Anderson, Anoka County Surveyor, testified that in 1960 his office started replacing missing section corners placed by government surveyors between 1847 and 1855 (T. 50) when surveying techniques were quite primitive (T. 61-68); that he found the East line of the North 1/2 of Sec. 4, T. 31, R. 24 (within which Auditor's Plat No. 4 lies), to measure 2,725.748[1] feet as compared to the 41.2 chains (2,719.2 feet) shown in the government survey (T. 66); that he assumed that Mr. Ridge had apparently assumed but incorrectly, that the 20 chains (1,320 feet) shown on the government survey[2], was correct (T. 59, 60), and by this faulty assumption, misdescribed the NE corner of Auditor's Plat No. 4 (T. 59) and all lots within Auditor's Plat No. 4 because their descriptions all originate from the North line of the plat[3] (T. 70), the effects of which are shown in a large scale map of the area (Respond trial Exh. 9)[4] which shows the various lot lines in disarray; that six

1/ See Appendix 86a-87a; 2/ 90a-91a; 3/ 83a, 92a-93a; 4/ 88a-89a.

tracts of land within Auditor's Plat No. 4 have so far been registered in separate proceedings (T. 68) and "that it would be a good thing to notify the rest of the people in the area that a problem exists." (T. 69); that in describing the same line, one survey could show the bearing of the line to be S 2½° W while another survey could show the bearing of the line to be S 3½° W, depending on the basis of the bearings (T. 70, 71); and that for about 40 years, all transfers of property within the plat used the descriptions shown in the plat (T. 102) and that all of those descriptions are faulty (T. 104).

And later the trial court concluded:

> As I understand it, if this torrens action should go through and if there were other torrens actions started by you or your neighbor, likewise there would be no loss to you . . . there is a faulty description down the line . . it appears that everyone in this plat, if they torrensed their land, you will just follow the lines of occupancy because that basically is what's intended here . . " T. 123)

Upon noting the proximity of the calls shown on respondents' survey (Exh. 2) [1/] and Auditor's Plat No. 4 [2/] (Exh. 5), and upon being satisfied from the proceedings that res-

1/ See Appendix 80a-81a; 2/ 82a-83a.

pondents' survey showed respondents' property as it lies accurately and with no showing of property acquired by adverse possession, appellant made the following offer of settlement in open court:

> I will withdraw my objection to the Mrosak application if the petitioners will withdraw their charges against me and under the condition that Mr. Mrosak or his attorney will provide me with a statement in writing that the Mrosak property will be described for registration purposes in accordance with the present lines of occupation as shown in the Prasch (respondents') survey of August 12, 1983 (T. 131; also page 8, Appellant's Brief)

Whereupon the trial court asked respondents whether respondents' survey did indeed follow the lines of occupation. Respondents' attorney replied, "Yes, to the best of my knowledge". (T. 132, 133; also page 8, Appellant's Brief) Whereupon the court then gave respondents three or four minutes to confer with their attorney, after which their attorney advised the court that respondents would not agree to the proposal - that trial should proceed as to the matter of attorney fees. (T. 134)

And so the trial continued with appellant endeavoring to satisfy the court that his

opposition was in good faith and with further testimony from Mr. Anderson and Mr. Prasch. On cross-examination of Mr. Anderson concerning his previous testimony that all lots within said plat are misdescribed and that the respective owners should be so notified, the trial court interceded saying,

> . . . We are not defending or doing anything to the whole plat, we are doing something with one lot. (T. 158)

But testifying to respondents' survey (Exh. 2), surveyor Prasch said that he found irons along the southeasterly line of the property he surveyed; that the dimension of the property (along the road as shown in his survey) of 67½ feet is the same as shown in Auditor's Plat No. 4 (T. 173); that the lakeshore footage of 45.1 feet as shown, compares to 45 feet shown in the plat (T. 175); that the SWly line of the property measures 238.79 feet as shown as compared to 239 feet shown in the plat (T. 176); that along the SWly line of the property (which divides Lot 17 and Lot 18), he found an old wire fence of at least 20 years of age marking the SWly line of the property

(T.184, 185); and that his survey shows that his survey lines fit the lines of occupation as he found them (T. 184; and in pages 6-8 of Appellant's Brief). And later, upon cross-examination on what was wrong with the bearings and distances shown in Auditor's Plat No. 4, he said he didn't know (T. 213), that all he knew was the plat bearings were not any good and that a new system of bearings were being put in throughout the area. (T. 216).

Later and upon cross-examination of Mr. Nash, one of respondents' attorneys, on whether all property owners affected by the registration should have been served, the trial court interceded, saying to petitioner:

> . .I hope you don't think you are carrying on a crusade here for people who may or may not have been served here. . to defend the plat. If this is what you have in mind, this is not the purpose of this hearing. . (T. 229, 230

Finally and upon being asked by the Court whether he felt the Mrosak property should be registered, petitioner replied:

> As I indicated, my principal concern is that Mr. Mrosak's property be described for registration purposes in accordance with the present lines of occupation as shown in Mr. Prasch's survey of August 12, 1983, and from

what I understand, that will now be the case. (T. 249; also page 9, Appellant's Brief).

Thereafter, Respondents' attorney presented a statement of attorney fees and expenses for court approval to which appellant objected and trial was concluded.

4. On February 5, 1986, a court order was filed[1/] which finds 1) Auditor's Plat No. 4 is not a surveyed plat; 2) the underlying descriptions of Lots 16, 17, and 18, are vague and indefinite; 3) any of respondents' property to which they do not have good recorded title, they have acquired by adverse possession; and 4) that the property be described by the applied-for metes and bounds description which makes no reference to it being Lot 17 of said plat.

5. On February 24, 1986, appellant motioned for amended findings or in the alternative, a new trial[2/] on the grounds 1) that Auditor's Plat is a valid plat and that respondents' property should continue to be identified as Lot 17 of said plat, and 2) that no evidence of adverse possession was introduced at the

1/ See Appendix 74a, 76a, 78a; 2/ 58a.

trial to justify the court's finding of same.

6. On February 28, 1986, a court order and memorandum[1/] were filed which find that petitioner did not act maliciously in opposing respondents' application to register but nevertheless is liable to respondents for attorney fees under Minn. Stat. 549.21 in the amount of $3,175.10 because "he knew he was dealing with a problem far beyond his level of expertise . . . and should have sought the services of a qualified surveyor, a real estate attorney, or both (pg. 6) . . . that he litigated too long without attempting to correctly assess his position and that amounts to gross negligence (pg. 8)". and judgment was ordered accordingly.

7. On March 17, 1986, hearing was held on Appellant's motion for amended findings or a new trial - at which time Appellant introduced into the record a letter received from his legal counsel, William A. Lindquist[2/], which advises Appellant that unless he can get the trial court to amend its findings, the title to Lot 18 will be rendered unmarketable. The court takes judicial notice of the letter (T. 6).

1/ See Appendix 61a; 2/ 51a.

And in a written brief that petitioner introduced at the hearing, he argued that respondents' property should be continued to be described as Lot 17 of Auditor's Plat No. 4 as it had been for over 40 years; that the Examiner of Titles had not explained in his report to the trial court why he had ignored that description; that respondents' own survey confirms from irons, an ancient fence, and lilac hedge found, that respondents' property lies just as the original survey of Auditor's Plat No. 4 shows it to lie. (T. 4, 5 - 22 inc.)

8. On March 25, 1986, petitioner motioned the trial court to recind its order for judgment[1/] filed February 28, 1986 and on the ground his concern for the marketability of his property was genuine as evidenced by the failure of the Examiner of Titles to justify his abandonment of Lot 17 in the description and Mr. Lindquist's letter[2/] which he attached to the motion.

9. On April 4, 1986, hearing was held on Appellant's motion of March 25 where he argued

1/ See Appendix 46a; 2/ 51a.

points of his motion, (referred to the Report of the Examiner of Titles which ~~Appellant~~ petitioner had introduced at March 17 hearing and to the absence therein of anything to justify the abandonment of Lot 17 in the description, and to Mr. Lindquist's letter (T. 1-5).

10. On May 6, 1986, a court order was filed denying ~~Appellant~~ petitioner's motion of March 25, saying only that the assessment of attorney fees was adequately explained in the court's order and memorandum filed February 28.

11. Also on May 6, 1986, a court order entitled AMENDED FINDINGS OF FACT, INTERLOCUTORY ORDER DETERMINING BOUNDARIES AND MEMORANDUM was filed which amended its February 5, 1986 findings by stating that by virtue of a "gap" of approximately 15 feet in width, the land described in the application includes parts of Lot 16 and Lot 17 but "that if any part of Lot 18 lies within the land described in the Application, Applicants have acquired title thereto by adverse possession. . " [1/] The court neither granted or denied petitioner's motion for amended findings or in the

---

1/ See Appendix 34a, 38a.

alternative a new trial.

12. On June 30, 1986, judgment for $3,175.10 was entered against Appellant.

13. On November 4, 1986, respondents motioned for an order and decree ordering registration of their property.

14. On November 12, hearing was held on respondents' motion at which time petitioner testified under oath that of the four judicial landmarks that should have been placed marking the four corners of respondents' property pursuant to the trial court's order filed May 6, 1986, he could find only one; that petitioner had not been served with a copy of the surveyor's plat and certificate showing the location of the judicial landmarks (service being made only immediately prior to the hearing); and that same was not on file with the court prior to the hearing (T. 12, 13, 14, 15). Petitioner also introduced a writtem memorandum into the record which argued against the various findings in the court's order filed May 6, 1986 and which asked that the judgment entered June

30, 1986, be set aside. Whereupon the court said respondents would have five (5) days within which to respond to the memorandum, after which the court would make a decision (T. 19, 20, 21). Respondents made no response to petitioner's memorandum.

15. On November 21, 1986, petitioner motioned for a rehearing on respondents' motion for an order and decree of registration and supported his motion with an affidavit as to the facts alleged therein.

16. On November 28, petitioner motioned the court to stay the judgment entered against him on June 30, 1986 or to make the judgment immediately appealable under Minn. Appellate Court Rule 104.01.

17. On December 8, petitioner became ill and arranged with the court and respondents for his motions to be heard by telephone conference with written argument to be mailed to the court and respondents' attorney prior to the hearing.

18. On December 15, 1986, hearing was held by

telephone with petitioner in Winona and respondents and the court at the Sherburne County Courthouse in Elk River, Minnesota. Petitioner introduced his written argument and same was received into the record (T. 4, 5). The presentation included reference to the various averments by affidavit attached to his motion of November 21 to wit: that prior to the hearing on November 12, petitioner had not been served with the surveyor's plat and certificate showing the location of the judicial landmarks; 2) that only after the hearing and upon a visit by the surveyor's crew, was petitioner apprised of their locations; 3) and whereupon he found his lakeshore frontage to measure 43½ feet as compared to approximately 46 feet for respondents' property. And in a schedule attached to his motion, showed that the latter computed by trigonometry to be 46.215' per said plat and certificate whereas Auditor's Plat No. 4 and respondents' survey show same to be 45 feet and 45.1 feet, respectively; 4) and by reference to Auditor's

Plat No. 4, that the certificates affixed thereon, establishes the plat as a valid plat; 5) and by reference to respondents' Exhibit 9 (the large map of the area showing lots within the plat that have been registered[1/], that all have been obtained through default judgments. (At trial, petitioner had argued this to be relevant but court ruled otherwise (T. 105, 106).

19. On December 16, 1986, an order and an order and decree of registration[2/] were issued and filed. The order stayed the judgment entered June 30, 1986 for $3,175.10 until the order and decree of registration was filed, denied appellant's motion for a rehearing on respondents' motion for an order and decree ordering registration, and granted respondents' motion for the order and decree. Order and Decree of Registration makes the following findings: 1) Auditor's Plat No. 4 is not a surveyed plat established under Minn. Stat. 505 (finding No. 11); 2) the boundary lines of Lots 16, 17, and 18 of said plat cannot

1/ See Appendix 88a-89a; 2/ 34a.

be located definitely and with accuracy by a competent surveyor (finding No. 12); 3) the boundary lines of lots shown on said plat do not correspond to the boundary lines of tracts actually occupied by the individual owners (finding No. 13); 4) part of Lot 16 lies within the land described in the application (finding No. 16); 5) a gap of approximately 15 feet exists between ~~appellant's~~ petitioner's Lot 18 and respondents' property **(Lot 17)** as described in the application and any part Lot 18 which lies within the gap, respondents have acquired by adverse possession (finding No. 17); 6) that this registration of title and boundary lines, in an of itself does not make the title to Lot 18 unmarketable (finding No. 19).

20. On April 16, 1987, petitioner appealed 1) the judgment entered June 30, 1986 against him for $3,175.10, and 2) the December 16, 1986 order and decree of registration, to the Minnesotat Court of Appeals. In his brief, petitioner argued, among other things, that respondents had failed Rule 30[1/] and Rule 40[1/] of the

1/ See Appendix 94a.

Minnesota Rules of Evidence which impose the burden of proof upon respondents and that had respondents traced the deed history of respondents' property thoroughly, they would have found that the underlying description of respondents' property and all other lots in Auditor's Plat No. 4, tie in with the North line of Auditor's Plat No. 4 from which the plat is described[1/]; but that if the new metes and bounds description which the trial court attributes to respondents' Lot 17 prevails, not only would all lots in Auditor's Plat No. 4 be adversely affected, but also the entire 41-lot Sunnyland Plat lying to the North[2/] and whose underlying description commences from the North line of Auditor's Plat No. 4. Respondents' reply brief did not respond to the above argument.

21. On November 17, 1987, a decision by the Minn. Court of Appeals was filed[3/] which affirmed the trial court's findings in their entirety and also the trial court's award of attorney fees to respondents.- but in so doing, disagreed with the trial court that

1/ See Appendix 82a-83a; 2/ 84a-85a; 3/ 15a.

gross negligence constitutes bad faith under Minn. Stat. 549.21 and upon which the trial court based its award of attorney fees. Nevertheless, the court of appeals affirmed the award because, "On review of the record, we feel that appellant's conduct in fact amounted to bad faith, not just gross negligence . . . When it became clear that the case was going to trial, he consulted neither a surveyor nor an attorney familiar with this area of the law. Appellant failed to take any steps to assess his position prior to trial."[3/]

22. On December 17, 1987, appellant petitioned the Minnesota Supreme Court[1/] to review the decision of the court of appeals. Petition argued that the court of appeals erred in overruling the trial court's finding that appellant had not acted in bad faith (See February 28, 1986 order[2/]) but nevertheless affirmed the award of attorney fees based on its own finding from a review of the record, that appellant had been grossly negligent and that such gross

1/ See Appendix 5a; 2/ 61a; 3/ 30a.

negligence amounted to bad faith; that the appeals court finding is especially dubious where the fact-finder did not hear appellant testify and argue his case. Appellant also argued that his defense of Auditor's Plat No. 4 was justified; that a genuine issue existed as to whether or not respondents' land should not be described in terms of Lot 17; that respondents' surveyor found irons locating the SEly and NEly corners of reapondents' land adjacent to Crooked Lake Lane, a wire fence along the SWly line dividing Lot 17 and Lot 18, and a lilac hedge, all of which are evidence of the original survey as certified to in Auditor's Plat No. 4; that the calls for road frontage, NEly and SWly lines, and lakeshore frontage in said plat and respondents' survey are virtually identical, thereby leaving no doubt that respondents' property is indeed Lot 17 as described in said plat; and that the description in the application renders appellant's property unmarketable because respondents' property cannot be plotted on

Auditor's Plat No. 4 from such description.

23. On January 28, 1986, an order by the Supreme Court of Minnesota was filed, deny-appellant's petition for review.

24. On April 14, 1988, the sheriff of Anoka County served petitioner with Notice of Sheriff's Execution Sale Real Property that his Lot 18 would be sold at public auction on May 31, 1988 to the highest bidder to satisfy the judgment entered against petitioner and that the judgment now amounted to $4,044.75.

REASONS FOR ALLOWANCE OF THE WRIT

1. Petitioner had the constitutional right under due process of law and equal protection under the laws, to appear in his own defense and without having obtained the advice of a surveyor or attorney prior to trial. Having become satisfied early in the proceedings that respondents' survey showed the location of respondents' property to be accurately described by the lines of occupation[1/], the record confirms that peti-

---

1/ See page 8 for transcript.

tioner had no reason to consult either a surveyor or an attorney prior to trial.

2. Petitioner had the constitutional right not to be deprived of property except under due process of law as based on interpretation of Minn. Stat. 549.21 founded on precedence. Here the trial court expressly found that petitioner's opposition to respondents' application was in good faith but nevertheless awarded respondents attorney fees based on a finding of gross negligence. But then the Minnesota Court of Appeals, while disagreeing with the trial court's basis for the award, took upon itself to nevertheless affirm the award based on its own finding of bad faith. This clearly ignored legal precedent as established in Flanigan v. Pomeroy (1902) 85 Minn. 264, 88 N.W. 761.

3. Petitioner had the constitutional right of fair play, an essential element of due process. U.S. v. Certain Parcels of Land in Prince George's County, Md., Dist Ct. Md. 1941, 40 F Supp. 436. But

this was absent here as evidenced in the findings in the Order and Decree of Registration[3/] as affirmed by the appellate courts of Minnesota which were in error as follows:

a) Finding No. 11 is not supported by the evidence. Auditor's Plat No. 4[1/] is a surveyed plat under the laws of 1911 as in effect on July 17, 1934, the date the plat was recorded.

b) Finding No. 12 is not supported by the evidence. Respondents' own survey[2/] locates the boundary lines of respondents' Lot 17 from irons found along Crooked Lake Lane and from a wire fence of 30 or more years vintage marking the northwesterly line, and a hedge found marking the northeasterly line of the property.

c) Finding No. 17 is not supported by the evidence. There is no "gap" between the southwesterly line described in the application and the northeasterly line of Lot 18 as evidenced by respondents' own survey[2/]. Nor is there anything of record to show that any

1/ See Appendix 82a-83a; 2/80a-81a; 3/ 34a.

land was acquired by adverse possession. The closeness of the calls between those shown in respondents' survey[1/] and Auditor's Plat No. 4[2/], belie the lower courts' finding as to such "gap".

d) The lower courts' conclusion that respondents' property be described by metes and bounds without identifying it as being Lot 17 of Auditor's Plat No. 4, is clearly not supported by the evidence. The property lines of respondents' property lie exactly as were layed out over 50 years ago as the monuments and physical evidence of those lines and respondents' own survey demonstrates. Hence no need exists for a change in the description of respondents' property.

4. The abandonment of Auditor's Plat No. 4 utterly lacked foundation and due process and a new trial should have been granted as petitioner had motioned for. The entire basis of respondents' avoidance of the plat rests on petty errors allegedly found in 1847-1855

1/ See 80a-81a; 2/ See 82a-83a

government surveys and in an assumption by County Surveyor Anderson that former County Surveyor Ridge had incorrectly assumed that the distance of 20 chains (1,320 feet) shown on the government survey, was correct, thereby attributing 1,531.86 feet as the distance from the S.E. corner of Government Lot 2[1/] to the North line of Auditor's Plat No. 4 allegedly in error. But respondents' surveyor Prasch when asked on cross-examination what precisely is wrong with Auditor's Plat No. 4, he said, "I wouldn't know"[2/]. To throw an entire community into turmoil on such flimsy evidence, is utter nonsense.

5. The setting of the judicial landmarks without petitioner being properly served with the surveyor's plat and certificate showing their locations, and by same not being on file with the clerk prior to the hearing on respondents' motion for order and decree of registration on November 12, 1986[3/], utterly lacked fair hearing due process. And the setting of such landmarks by other landmarks set

---

1/ See 90a-91a; 2/ 10; 3/ 15.

in registrations obtained under default judgments[4] and where the lakeshore frontage attributed to respondents' property actually measures and computes trigonmetrily to over 46 feet as compared to the 45.1 feet shown in respondents' survey, likewise violated due process.

6. On the basis of fair hearing and/or fair play, the Supreme Court of Minnesota should have granted review of the Minnesota Court of Appeals' decision. It had before it petitioner's petition for review[3] and that petition clearly set forth reasons sufficient to justify review.

7. This is a case with far-reaching consequences. As matters stand, not only will all owners of lots within Auditor's Plat No. 4 feel compelled to register their respective properties by metes and bounds descriptions in order to have marketable titles, but also all owners in the large 40-lot Sunnyland Plat[1] whose underlying description has as its point of beginning the North line[2] of Auditor's Plat

1/ See 84a-85a; 2/ 90a-91a; 3/ 5a; 4/ 18.

No 4, will feel similarly compelled. A review by this court would also likely put to rest the issue of whether property lines long established by physical evidence of an original survey, can be subsequently destroyed in violation of the precedence established in Dittrich v. Ubl (1944) 216 Minn. 396; 13 N.W.2d 384.

8. And finally, a review by the Court would help clarify the conditions under which award of attorney fees may be granted.

CONCLUSION

The decision of the lower courts here would result in petitioner being deprived of his property unjustly and unconstitutionally. As matters now stand, not only has Petitioner's Lot 18 been rendered unmarketable, but it has also been levied against under notice of sheriff's sale - all in breach of the lower court's rules of evidence and constitutional due process.

A grant of writ of certiorari in this case will aid in the Court's jurisdiction

by making it possible for all who now or in the future own land within a duly surveyed, certified-to and recorded plat, to obtain relief where, for unjust and feeble reasons, a plat is declared invalid - and where, as in this instance, exceptional circumstances warrant the exercise of the Court's discretionary and supervisory powers.

Evan J. Henry
Rt. 1, Box 60
Winona, Minnesota 55987
(507) 452 9338

Petitioner Pro Se

Dated: May 20, 1988

APPENDIX

NOTICE OF SHERIFF'S
EXECUTION SALE
REAL PROPERTY

Under and by virtue of an Execution issued out of and under the seal of the District Court of the State of Minnesota, in and for the Tenth Judicial District and County of Anoka on the 29th day of February, 1988 upon a judgment rendered and docketed in said Court and County in an action therein, wherein Stanley M. Mrosak and Delores A. Mrosak were plaintiffs, and Evan J. Henry was defendant, in favor of said plaintiff and against said defendant for the sum of $3,567.10 as appears in the judgment roll filed in the office of the Clerk of said District Court for said County of Anoka and

WHEREAS, there is currently due on said judgment the sum of $4,044.75, plus additional interest computed up to and including the date of sale and all of my fees, costs and disbursements of levy and sale, and

WHEREAS, said execution has to me as Sheriff of Anoka County been duly directed and delivered,

PLEASE TAKE NOTICE that I have levied and will sell at public auction to the highest cash bidder, at the Main Office of the Anoka County Sheriff, in the City of Anoka, County of Anoka, on the 31st day of May, 1988 at 11:00 in the forenoon of that day, all the right, title and interest that the above named defendant had on the 19th day of December, 1986 (that being the date of docketing of said judgment in Anoka County) in and to the real estate hereinafter described, or any interest therein which said defendant has since that day acquired, the description of the property being as follows, to wit:

Lot 18, Auditor's Subdivision No. 4.

Dated: Anoka, Minnesota, April 14, 1988.

Dated: Anoka, Minnesota, April 14, 1988.

(Signed) Kenneth G. Wilkinson
Sheriff of Anoka County,
Minnesota
by:
(Signed) Dave Briley,
Deputy Sheriff.

ROSERIDGE ATTORNEYS
Attorneys for Judgment Creditor
1611 West County Road B
Roseville, Minn. 55113
(612) 631-3722

STATE OF MINNESOTA

IN SUPREME COURT

C5-87-499

In the Matter of the Application of
Stanley M. Mrosak and Delores A. Mrosak
To Register the Title to Certain Land

O R D E R

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Evan J. Henry for further review be, and the same is, denied.

Dated: January 28, 1988

BY THE COURT:

(Signed) Lawrence N. Yetke
Associate Justice

Office of Appellate Courts
January 28, 1988
Filed

STATE OF MINNESOTA

IN SUPREME COURT

CASE TITLE:

In the Matter of the Application of Stanley M. and Delores A. Mrosak to Register the Title to Certain Land,

Respondents,

vs.

Evan J. Henry,

Appellant.

Appellate Court Case Number: C5-87-499

Date of Filing of Court of Appeals Decision November 17, 1987

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS

William A. Lindquist
Attorney for Appellant
63½ West Fourth Street
Winona, Minnesota 55987
(507) 452 4614
Attorney Registration
No. 63563

ROSERIDGE ATTORNEYS
BY: Larry K Houk
Attorneys for Respondents
1611 W. County Rd. B
Suite 218
Roseville, Minn. 55113
(612) 631 3722
Attorney Registration
No. 47430

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

Evan J. Henry, appellant herein, requests

the Supreme Court to review the decision of the Court of Appeals.

I. Legal Issues and Their Disposition by the Court of Appeals

a. Did the trial court err in granting respondents' application to register their land? The Court of Appeals held the trial court did not err.

b. Were attorney fees properly awarded? The Court of Appeals held they were.

II. Statement of Criterea

The Court of Appeals made its own finding of bad faith on the part of appellant, even while failing to reverse the trial court's express finding that appellant had not acted vexatiously or wantonly or for oppressive reasons and that the court could find no malicious motivation by appellant, nor that his defense was based on greed or profit of any kind. Criterea: R.C.A.P. 117, Subd. 2(c) and (d)(3).

On the issue of registration, the decision of the lower court has unnecessarily im-

pugned the titles to all the unregistered lots in Auditor's Plat No. 4. If the decision stands, then the lot owners will unfairly be forced to register or quite their titles. Criterea: R.C.A.P. 117 Subd. 2(a).

III. Statement of the Case

This title registration proceeding in District Court for Anoka County, Tenth Judicial District, was heard by the Honorable Robert B. Danforth on January 27, 28, 1987. Respondents applied for registration of their title to Lot 17 of Auditor's Plat No. 4. In so doing, they proposed a new metes and bounds description which identified the land as being a "part of Auditor's Plat No. 4" without reference to Lot 17. Appellant owns the adjacent Lot 18 and appeared pro se in opposition. Appellant asks that respondents identify their land as being Lot 17 of Auditor's Plat No. 4. The trial court granted registration according to the description in respondents' application. The trial court also awarded respondents $3,175.10 in attorney fees. Appellant

appealed the decree of registration filed December 16, 1986 and the judgment for attorney fees filed June 30, 1986. The Court of Appeals filed its decision on November 17, 1987. The case was considered and decided by Presiding Judge Sedgwick, Judge Parker, and Judge Huspeni who wrote the opinion. The Court of Appeals upheld the registration without change. It also upheld the trial court's award of attorney fees, stating that while it disagreed with the trial court's belief that gross negligence constitutes bad faith for the purpose of awarding attorney fees, it felt on review of the record that appellant's conduct in fact amounted to bad faith, not just gross negligence.

IV. Argument

While the trial court found appellant had not acted "vexatiously or wantonly or for oppressive reasons" nor for "greed or profit of any kind," the trial court faulted appellant for not seeking the advice of a surveyor or attorney once he had elected to liti-

gate. This failure, the trial court found, was gross negligence and amounted to bad faith under M.S. 549.21. The trial court emphasized that the basis for its finding of bad faith "centers" around this "gross negligence" and "not bad faith in the usual sense of the word." (App. 4)

The Court of Appeals disagreed with the trial court's belief that gross neglience constitutes bad faith for the purpose of awarding attorney fees. That ruling should have resulted in a remand of the case to the trial court for new findings on the issue of bad faith. Instead, the Court of Appeals, on its "review of the record", found that appellant's conduct amounted to bad faith, overruling the trial court's finding of just gross negligence. The Court of Appeals failed to set aside the trial court's findings that appellant had not acted vexatiously or wantonly or for oppressive reasons, nor out of malicious motivation, nor for greed or profit; nor was there any basis for the court to do so. These findings thus contra-

dict the Court of Appeals's finding of bad faith. (App. 27)

The Court of Appeals erred in taking it upon itself to make the finding of bad faith. That is a matter for the trial court. Flangan v. Pomeroy (1902) 85 Minn. 264, 88 N.W. 761. Moreover, the proposition that appellant's failure to consult with either a surveyor or attorney, or otherwise assess his position prior to trial, (where appellant appears pro se) amounts to bad faith, is dubious. The Court of Appeals at the same time "absolutely affirms appellant's right to represent himself at trial as he "sees fit." The bad faith finding is especially dubious where the fact-finder did not hear appellant testify and argue his case.

Appellant's determination to defend Auditor's Plat No. 4 was justified. There is a genuine issue as to whether or not respondents' land should not be described in terms of Lot 17. See Surveyor Prasch's survey (Applicants' Exhibit No. 2). Note the "found

irons" on the southeast and northeast corners of respondents' land; not the adjacent Crooked Lake Lane. Note the "wire fence along line" on the southwest line of respondents' property, and the "lilac hedge" along the northeast line. This evidence of the land respondents possessed is also virtually conclusive as to the location of Lot 17 of Auditor's Plat No. 4. The iron stake, the fence, the road, the lilac hedge, are all monuments that evidence the lines of the original survey. (The surveyor's certificate on Auditor's Plat No. 4 clearly states that he "surveyed and platted" the property shown in the plat.) (Exhibit 5). The courses and distances in the Prasch survey, which according to testimony here, would pass Lot 17 "through a portion of appellant's house, must give way to the better evidence of these monuments as to the location of the original line of Auditor's Plat No. 4 (Trans. pp 83, 84, 114, 121, 152, and 183; and the Court of Appeals' opinion). Dittrich v. Ubl (1944) 216 Minn. 396; 13 N.W. 2d, 384.) Note further the virtually ident-

ical calls of the Prasch survey and Lot 17, Auditor's Plat No. 4:

	Prasch Survey	Lot 17, Auditor's Plat No. 4
Road frontage	67.5 feet bearing N 47°15' E	67½ feet bearing S 47 3/4° W
Northeast line	241.19 feet bearing N 52°13'04" W	241 feet bearing N 51 3/4° W
Southwest line	238.79 feet bearing S 46°53'54" E	239 feet bearing N 47° w
Lake frontage	45.1 feet	45 feet

There is, therefore, strong reason to tie respondents' registration to Lot 17 and not to place it just somewhere at large within the bounds of Auditor's Plat No. 4.

So appellant had a legitmate issue. Even if appellant had failed to have a valid issue at trial, that does not necessarily constitute bad faith. Plaintiff was forgiven such an error in Libera v. Burlington Northern R. R. Co. (Minn. App. 1986) 394 N.W. 2d 827. And normally this court is reluctant to assess attorney's fees against a pro se litigant. Liedtke v. Fillenworth (Minn. App. 1985) 372

N.W. 2d 50.

The trial court's failure to identify respondents' registered land as being Lot 17 produces an unconscionable result. Finding number 7 " that the land described in the application includes parts of Lots 16 and 17, Auditor's Plat No. 4", beyond doubt destroys the marketable title of the owner of Lot 16 (App. 11), and finding number 17 that "if any part of Lot 18 lies within the land described in the application, applicants have acquired title thereto by adverse possession. . . ", likewise renders Lot 18 unmarketable. This is especially true where as here (a) the Court of Appeals' decision points out "according to the lines set out in the Auditor's plat, respondents' boundary passes through a portion of appellant's house" (untrue of course, but damaging) and (b) where superimposing respondents' metes and bounds description upon Auditor's Plat No. 4 to see where it lies is a difficult, even impossible task as anyone who tries to plot it will find.

In the interests of justice, this petition of (for) review should be granted.

Dated: December 16, 1987

(Signed) William A. Lindquist
Attorney for Appellant
63½ West Fourth Street
Winona, Minnesota 55987
(507) 452 4614
Attorney Registration
No. 63563

STATE OF MINNESOTA

IN COURT OF APPEALS

C5-87-499

Anoka County Huspeni, Judge

In the Matter of the Application of Stanley M. Mrosak and Delores A. Mrosak to Register the Title to Certain Land

Evan J. Henry
Route 1, Box 60
Winona, MN 55987

Larry K. Houk
1611 W. County Road B
Suite 218
Roseville, MN 55113
Attorney for Respondents Mrosak

Filed: November 17, 1987
Office of Appellate Courts

S Y L L A B U S

1. The order of the trial court granting respondents' application to register their property was not clearly erroneous.

2. Attorney fees were appropriate, given the unwarranted and groundless nature of appellant's claim.

Affirmed.

Considered and decided by Sedgwick, Presiding Judge, Parker, Judge, and Huspeni, Judge, with oral argument waived.

O P I N I O N

HUSPENI, Judge

Evan J. Henry appeals from the district court's grant of respondents Mrosaks' application to register their land pursuant to Minn. Stat. 508.10. Appeal is also taken from district order awarding respondents $3,175.10 in attorney fees based on what the court determined was appellant's gross negligence amounting to bad faith. We affirm.

FACTS

Respondents are owners in fee simple and as joint tenants of property described as Lot 17 of Auditor's Plat No. 4. This property lies on the shore of Crooked Lake in Anoka County, Minnesota. In 1934, the auditorr of Anoka County filed the auditor's plat which included the above description of the respondents' property. Such a plat is not a subdivision plat based on a survey of the premises in accord-

ance with Minnesota Statutes 505, but is an auditor's subdivision based on deeds of record in accordance with Minn. Stat. 272.19. This description has been used for tax purposes and as the sole description of the property for almost 50 years.

Respondents were informed, apparently in 1983, that auditor's plat no. 4 was an inadequate description of their property, had numerous inconsistencies and left their property unmarketable. In an attempt to clear up the problems with the title created by the auditor's plat description, the respondents, in accordance with Minn. Stat. 508.10 (1982), applied to the district court to have their property registered. As part of this process, the respondents hired Raymond Prasch to survey the property and give them a more accurate description of it. This survey was completed and dated August 12, 1983. It was filed with the clerk of court on January 16, 1985.

The testimony disclosed numerous problems with the auditor's plat description of the prop-

erty. Among these problems were the following:

> 1) The boundaries contained in the auditor's plat did not conform to the boundary lines of tracts actually occupied by the owners.
>
> 2) The auditor's plat used the shore of Crooked Lake as the starting point for a set of bearings and that, because the shore of the lake would go up and down, the description of the property would continue to change. This left the description of the property vague and indefinite.
>
> 3) The description used in the auditor's plat was inaccurate because its boundaries did not "close", i.e., the lines of the property did not meet up if one took measurements around the property.

Among those who were potentially affected by respondents' application to have their land registered, was appellant who owns property described as lot 18, auditor's plat no. 4. This land abuts respondents' lot. According to the lines set out in the auditor's plat, respondents' boundary passes through a portion of appellant's house. As a result, appellant considered an interested party under Minn. Stat. 508.15. Accordingly, he received a summons and complaint in February of 1985 and served his answer on February 27, 1985.

In a series of correspondence between the parties and between appellant and others, appellant voiced concerns regarding the registration of respondents' property. Primarily, appellant believed that the auditor's plat sufficiently described the property owned by the parties. In a letter dated April 20, 1985 from appellant to respondents, appellant stated that it was his personal opinion that "a vigorous defense of Auditor's Plat No. would be successful" and therefore the parties should continue to rely on the auditor's plat.

On August 26, 1985, the Anoka County Surveyor, Roland W. Anderson, sent a letter to Appellant stating there were "land problems that exist in Auditor's Plat No. 4" (as evidenced by maps and surveys sent to appellant) and that all the land owners in the area would "eventually have to do something in order to have marketable title." Anderson also suggested to appellant that he join with other land owners in the area to hire an attorney and a surveyor in an effort to clear up the problem. Appellant

did not heed this advice, however, and continued to press his claim that the auditor's plat was defensible. At no time prior to trial did he seek the advice of a surveyor to do an independent examination of the property.

In October, appellant received a certificate of readiness for trial. Respondents also filed a notice claiming that the appellant was acting in bad faith and seeking attorney fees. According to the trial court's findings of fact, appellant did nothing at this point to assess his legal stand. The court found that appellant did not seek the advice of an attorney nor did he have the land in question surveyed. As the court stated in its order for judgment, "instead of seeking the proper advice, Henry filed a Certificate of Non-Readiness and served interrogatories which were directed to the bad faith issue." The matter finally came to trial on January 27, 1986.

At trial, respondents presented three witnesses in order to lay the necessary foundation for the registration of their property. They

were Roland Anderson, the Anoka County Surveyor, Raymond Prasch, who surveyed the respondents' property, and Stephan Nash, an attorney who testified regarding respondents' attempts to notify all interested parties. The testimony of Anderson and Prasch was quite detailed in its explanation of the inconsistencies in the auditor's plat and the problems that were created when one tried to rely on it. Both men explained findings of the survey taken by Prasch and how this survey gave a much more complete and accurate description of the respondents' property. Both men agreed that the effect of the new survey was to conform the legal description of the property to the lines of current occupation and that the respondents were claiming less than they could have under the auditor's plat.

Appellant called no witnesses to testify regarding the registration issue. In his case in chief, appellant only addressed the issue of whether he had been acting in bad faith. Appellant first called respondent Stanley

Mrosak. Mrosak testified that it was his belief that the appellant had been acting in bad faith in contesting the application. Next, appellant took the stand. During the course of his testimony, the following exchange took place:

> THE COURT: * * * Perhaps we could take this in two stages, Mr. Henry, if I could just direct you in a general way so you will know, so you can direct your testimony. Number one, would you first tell us why -- give us your side of the case regarding why you do not feel the Court should allow this property property of Mr. Mrosak's to be torrensed, and then the second part of your testimony after you are done with that part can deal with why you feel you have acted in good faith. * * *
>
> MR HENRY: Well, at this point, your Honor, I think that my concerns have been satisfied as far as the torrensing of Mr. Mrosak's property * * *.
>
> As I indicated, my principal concern was that Mr. Mrosak's property be described for registration purposes in accordance with the present lines of occupation as shown in Mr. Prasch's survey of August 12, 1983, and from what I understand, that will now be the case.

Appellant then went on to address the bad faith issue. On cross-examination, appellant's testimony showed that he had been informed by several parties that there were problems with the

auditor's plat that the survey done by Prasch was an accurate description of the property, and that he should consult a surveyor or an attorney. After questioning appellant regarding a letter he had received from the Board of Architecture, Engineering, Land Surveying and Landscape Architecture dated October 25, 1984, Mr. Neilson, attorney for the respondents, proceeded:

> Q. Why wasn't (the response you received from the board) sufficient to answer your question?
>
> A. Because it didn't answer the questions If you will follow along, you will see further questions which I raised.
>
> Q. The further questions that you raised, have those answers been given to you prior to testimony today? The same answers, exactly the same answers why you have different bearings, why you have different footage, why you can't measure along the lake, have those answers been given to you?
>
> A. I think through the proceedings in this trial, I have been more satisfied now than before.

During the trial, appellant tried to explain why he was fighting the registration of respondents' property despite the fact that the evidence indicated that he would be harmed

by enforcing the status quo. Appellant's explanation was that he had "lived with Auditor's Plat No. 4 all these years," and that he wanted to "make sure that the process was working properly."

The court granted respondents' application to register their land. In addition, the court assessed attorney fees against appellant, pursuant to Minn. Stat. 549.21 (1984), in the amount of $3,175.10. The court did not grant respondents their full request but granted to them fees incurred during the three-month period between October 17, 1985, when appellant received notice that the case was set to go to trial, and January 28, 1986, the conclusion of the trial. The judge based his award of attorney fees on what he saw to be appellant's "gross negligence" amounting to bad faith in failing to seek "legal or survey advice" or otherwise assess his position prior to trial. The court stated that appellant "was grossly negligent when, after receiving the Certificate of Readiness and notice of bad faith, he did

nothing affirmative to assess his legal position for a period of three months," and that appellant had "relied on the trial to educate himself." The court acknowledged that the basis of its finding that the appellant had acted in bad faith was not based upon a finding that the appellant had acted with a malicious motivation or for greed for profit. It held that appellant's gross negligence "for not seeking the advice of a surveyor or attorney" was sufficient to support a finding of bad faith under section 549.21 (1984) and sufficient to base an award of attorney fees.

ISSUES

1) Did the trial court err in granting respondents' application to register their land?

2) Were attorney fees properly awarded?

ANALYSIS

I

Appellant first raises the propriety of the trial court's order granting respondents' application to register their property. This order will not be reversed unless it can be·

said that it was clearly erroneous. Minn. R. Civ. P. 52.01. We do not find it to be so and uphold the trial court's decision.

The record clearly supports the trial court's action. Respondents presented three witnesses in support of their application. The testimony was quite extensive as to the problems encountered when trying to rely on auditor's plat no. 4. Prasch and Anderson both showed that the auditor's plat was so deficient that the boundaries did not even close.

On the other hand, appellant presented no evidence to support his objections to the registration of the property. He did not support his personal belief that the auditor's plat was defensible. Nor did he present any evidence to show that he would be harmed if the application was granted. In his own testimony, he conceded the appropriateness of allowing the respondents to register their property along the lines of current occupation. We struggle to understand, as did the trial

court, why appellant chose to so vociferously fight respondents' application - a move that could only benefit him. Whatever appellant's motives, it is clear that the trial court acted properly in granting the application to register respondents' property.

II.

The more difficult issue in this case is whether the trial court correctly assessed attorney fees against appellant. Such fees may not be awarded absent a specific contract permitting or a statute authorizing such recovery. Barr/Nelson, Inc. v. Tonto's Inc., 336 N.W. 2d 46, 53 (Minn. 1983); Strand v. Nelson, 380 N.W. 2d 906, 909 (Minn. Ct. App. 1986). Minn. Stat. 549.21 (1984), under which the award was granted, provided:

> Upon a motion of a party, the court in its discretion may award to that party costs, disbursements, reasonable attorney fees and witness fees if the party or attorney against whom costs, disbursements, reasonable attorney fees are charged, acted in bad faith; asserted a claim or defense knowing it to be frivolous; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon

the court. * * * (1)

Id.

Section 549.21 is a codification of the common law rule that attorney fees are recoverable where the party has acted in bad faith, vexatiously, or for oppressive reasons. Fownes, et al. v. Hubbard Broadcasting, Inc., 310 Minn. 540, 542, 246 N.W. 2d 700, 702 (1976); National Recruiters, Inc. v. Toro Company, 343 N.W. 2d 704, 708 (Minn. Ct. App. 1984). Under this statute, an award of attorney fees may be upset only upon a finding of abuse of discretion by the trial court. Blattner v. Forster, 322 N.W. 2d 319 (Minn. 1982); National Recruiters, Inc., 343 N.W. 2d at 709.

Fees may be awarded upon a finding that a complaint is unwarranted or unfounded. Valento v. Ulrich, 402 N.W. 2d 809, 814 (Minn. Ct. App. 1987) (citing Strand v. Nelson, 380 N.W. 2d at 910). This court has also upheld an award of attorney fees where a party failed

1. In 1986, the legislature amended 549.21. The statute now would allow recovery where the asserted claim was frivolous and costly to the other party, whether or not it was knowingly frivolous.

to present any evidence at trial in support of its position. See National Recruiters, Inc. However, where the record indicates no bad faith and where there are bona fide issues to decide, it is improper to award fees. Valento, 402 N.W. 2d at 814 (citing Application of Hofstad, 376 N.W. 2d 698, 702 (Minn. Ct. App. 1985)). The mere fact that the action is not well-founded in law is not sufficient to render an award of attorney fees appropriate. Valento, 402 N.W. 2d at 814. The court in Valento held that the trial court's award of attorney fees was an abuse of discretion where the appellant was "motivated by a good faith belief that his integrity had been impugned." Id.

We disagree with the trial court's belief that gross negligence constitutes bad faith for the purpose of awarding attorney fees. However, this court will not reverse "solely because of the trial court's choice of words in its findings of fact." Strand, 380 N.W. 2d at 910. On review of the record, we feel that appellant's conduct in fact amounted to bad

faith, not just to gross negligence. Therefore, we uphold the trial court's award of attorney fees.

Appellant's claims were unwarranted and unfounded. He was not acting on some well founded (or at least reasonable) legal basis. Rather, he was acting on his "personal opinion" that auditor's plat no. 4 was defensible. When it became clear that the case was going to trial, he consulted neither a surveyor nor an attorney familiar with this area of the law. Appellant failed to take the steps to assess his position prior to trial. At trial, he presented no evidence in support of his position. As the trial court noted, appellant relied on the trial to educate himself. This, we believe, constitutes bad faith.

In holding that appellant's behavior amounted to bad faith, we affirm absolutely the right of an individual to represent himself at trial in the manner he or she sees fit. However, with this right comes responsibility. A litigant, whether represented by counsel or acting

pro se, must do something more than merely interfere with the rights of others. If appellant thought he had a legitimate reason for objecting to respondents' application to register their property, then he had a duty to put such objections in concrete form prior to the time the case came to trial. There was ample opportunity for appellant to do this. He was told by at least one party that he should hire a surveyor if he had questions about the inadequacies of auditor's plat no. 4. He did not.

Respondents acted in good faith at all times through this process. After being informed that the description of their property was inadequate, they took steps to avoid future legal problems. Their actions did not harm appellant. In fact, the registration of the property would benefit appellant inasmuch as the auditor's plat showed the line of respondents' property running through the middle of appellant's house. Again, we are unable to discern why appellant chose to fight this act-

tion. It is his claim that he had to insure that the process was working. But while appellant was insuring that the process was working, he cost respondent a great deal of aggravation, time and expense. Had there been some good faith basis for his claim, we could not uphold an award of fees. However, the record is clear that there was no such basis. Under these circumstances, attorney fees are appropriate. 2

D E C I S I O N

The order of the trial court granting respondents' application to register their property is hereby affirmed. An award of attorney

2. Appellant has submitted numerous items to this court seeking their inclusion in the record. The apparent goal of appellant is to show that he was acting in good faith in objecting to respondents' application to register their land. We have reviewed these items, and conclude that their inclusion in the record would not cause us to alter our analysis. None of the proposed items negate the fact that appellant failed to make a good faith effort to assess his position prior to trial.

fees to respondents in the amount of $3,175.10 is also affirmed.

Affirmed.

(Signed) Doris Ohlsen Huspeni

November 10, 1987

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

T-2820

In the Matter of the Application of

Stanley M. Mrosak and
Delores A. Mrosak, husband
and wife, as joint tenants.

ORDER AND DECREE
OF REGISTRATION

To Register the Title to Certain Land

The above entitled matter came on for hearing on the 12th day of November, 1986, before the Honorable Robert B. Danforth, Judge of the above named Court, without jury, at the Courthouse in the City of Anoka, said County and State; Stephan J. Nash, Esq., appearing for the applicants, Stanley M. Mrosak and Delores A. Mrosak; and the Defendant, Evan J. Henry, appearing Pro Se; and the Court having duly considered the Application and any amendments thereto, the Report or Reports of the Examiner of Titles and the evidence adduced at trial, makes the following FINDINGS:[1/]

1. That no answer or appearance of any kind

1/ Findings unrelated to this petition, have not been reproduced, viz. 3, 4, 9, 14, 15, 20, 22, 23, 24, 25, 26, 27, 28, 29, 33, and 34 have been excluded.

has been filed in said proceedings, except for the appearance of Defendant Evan J. Henry at trial on January 27 and 28, 1986; and that said Defendant Evan J. Henry, whose claims have been adjudicated at said trial, has no right, title, estate, lien or interest in the real estate hereinafter described;

2. That, except as hereinafter provided, none of the Defendants named in the Summons and any amendments or supplements thereto, have any right, title, estate, lien or interest in the real estate hereinafter described;

5. That the applicants desire to register the northeasterly, southeasterly and southwesterly boundary lines. That the applicants have had the land involved herein surveyed by Lot Surveys Company, Surveyors, of Brooklyn Park, Minnesota and have previously filed herein on January 6, 1985 a Plat of Survey (marked at trial as Applicants' Exhibit 2) showing the boundary lines of said premises claimed by the Applicants and that said boundary lines are shown upon said plat. That judicial land-

marks have been placed pursuant to an Interlocutory Order.

6. That the land description set forth in Paragraph C of the Application in this matter is a correct description within the meaning of Minnesota Statutes, Section 508.06, Clause (3).

7. That the land described in the Application includes parts of Lots 16 and 17, Auditor's Plat No. 4.

8. That the Applicants acquired record title as joint tenants to Lot 17, Auditor's Plat No. 4 by Warranty Deed dated December 15, 1982 and filed December 16, 1982 as Anoka County Recorder Doc. No. 603757.

10. That Defendant Evan J. Henry claims record title to Lot 18, Auditor's Plat No. 4.

11. That Auditor's Plat No. 4, recorded July 17, 1934 in Book E of Plats at page 16 in the office of the Anoka County Recorder, is an Auditor's Subdivision established under Minnesota Statutes, Section 272.19 and is not a surveyed plat established under Minnesota

Statutes, Chapter 505.

12. That the boundary lines of Lots 16, 17 and 18, Auditor's Plat No. 4, cannot be located definitely and with accuracy by a competent surveyor; and that the description in Applicant's deed filed in Anoka County Recorder Doc. No. 603757 and noted in Finding 8, above, is indefinite.

13. That the boundary lines of the lots shown on the plat of Auditor's Plat No. 4, do not correspond to the boundary lines of tracts of land actually occupied by individual owners.

16. That as to the part of Lot 16, Auditor's Plat No. 4 lying within the land described in the Application and as to any other part of the land described in the Application to which Applicants do not have good record title, Applicants and their predecessors in interest have acquired title thereto by adverse possession, by occupying it for fifteen years in a manner which is actual, open, continuous, hostile and exclusive and accompanied by an intention to claim adversely.

17. That there is a gap between the southwesterly line of the land described in the Application and the northeasterly line of Lot 18, Auditor's Plat No. 4; that said gap is narrower near the shore of Crooked Lake; that there is no evidence establishing that the land described in the Application includes any part of said Lot 18; and that if any part of said Lot 18 lies within the land described in the Application, Applicants have acquired title thereto by adverse possession as stated in Finding 16, above.

18. That Defendant Evan J. Henry does not have record title to any part of Lot 17 and has not sustained his burden of proof to show that he or his predecessors in interest have acquired title by adverse possession, or any other means, to any part of the "gap" referred to in Finding 17, above, or to any part of the land described in the Application.

19. That this registration of title and registration of boundary lines proceeding, in and of itself, does not make the title to Lot 18,

Auditor's Plat No. 4, unmarketable.

21. That the southeasterly line of the property being registered herein runs along the northwesterly line of Crooked Lake Lane; and that said Crooked Lake Lane is open and in use.

30. That if any part of the property being registered includes part of the bed of Crooked Lake, a meandered lake, that said property has been acquired by the Applicants by accretion or reliction.

31. That after the trial of the merits of the case on January 27 and 28, 1986, the Anoka County District Court entered Findings of Fact and Interlocutory Order Determining Boundaries in the above entitled matter on February 5, 1986.

32. That Amended Findings of Fact and Interlocutory Order Determining Boundaries were entered in the above-entitled matter on May 6, 1986.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. That a default as to each defendant, except Evan J. Henry, named in the Summons and any Amendments or supplements thereto and all heirs and devisees of any of the persons named therein who are deceased and, "all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate hereinafter described," is hereby entered in the above entitled action.

2. That Evan J.Henry, whose claims have been adjudicated, has no right, title, estate, lien or interest in the real estate hereinafter described.

3. That Stanley M. Mrosak and Delores A. Mrosakd husband and wife, as joint tenants, whose post office address is 3900 Bassett Creek Drive, in the City of Golden Valley, County of Hennepin, State of Minnesota, are the owners of estate in fee simple described as follows:

That part of Government Lot 2, Section 4, Township 31, Range 24, Anoka County, Minnesota, described as follows:

Commencing at the intersection of the South line of said Government Not 2 and the westerly line of Crooked Lake Boulevard, distant 535.70 feet West from the southeast corner of said Government Lot 2; thence North 3 degrees 20 minutes West, along said westerly line of Crooked Lake Boulevard, a distance of 35.14 feet; thence North 14 degrees 09 minutes East, continuing along said westerly line, a distance of 605.65 feet; thence South 47 degrees West a distance of 438.52 feet; thence South 65 degrees 19 minutes West a distance of 99.50 feet; thence North 33 degrees 53 minutes 30 seconds West a distance of 25.33 feet; thence North 65 degrees 19 minutes East a distance of 100.00 feet; thence North 47 degrees 50 minutes East a distance of 135.25 feet to a Judicial Landmark set pursuant to Torrens Case No. T-2192; thence North 47 degrees 15 minutes 00 seconds East a distance of 135 feet to the actual point of beginning of the tract of land to be herein described; thence continuing North 47 degrees 15 minutes 00 seconds East a distance of 67.50 feet; thence North 52 degrees 13 minutes 04 seconds West a distance of 243 feet, more or less, to the shore of Crooked Lake, thence southwesterly, along said shore, to the intersection with a line bearing North 46 degrees 53 minutes 54 seconds West from the actual point of beginning; thence South 46 degrees 53 minutes 54 seconds East a distance of 244 feet, more or less, to the actual point of beginning.

(Said tract is also known as part of "Auditor's Plat No. 4").

The northessterly, souteasterly and southwesterly lines of the above described land are marked by judicial landmarks set pursuant to Torrens Case No. T-2820.

4. That the said interest in land be brought under the provisions and operations of Chapter 508, Minnesota Statutes, and all acts amendatory thereof, and that the title thereto be confirmed and registered as provided in and said act; subject, however;

To any rights or encumbrances which may be subsisting, specified in Section 508.25, Chapter 508, Minnesota Statutes, and all acts amendatory thereof;

5. That Stanley M. Mrosak and Delores A. Mrosak are 59 and 56 years of age, respectively, and are under no disability and are married to each other.

IT IS FURTHER ORDERED that on the first Certificate of Title, the Registrar of Titles shall show by memorial that "Rights of appeal under Minnesota Statutes Section 508.29 exist with respect to Torrens Case No. T-2820"; said memorial may be cancelled by directive of the Examine of Titles issued pursuant to Minnesota Statutes Section 508.71,

Subdivision 2, when such rights of appeal have terminated.

Dated this 16 day of December, 1986.

(Signed) Robert B. Danforth
Judge of District Court

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

In the Matter of the Application of

Stanley M. Mrosak and Delores A. Mrosak, husband and wife, as joint tenants

ORDER

File No. T-2820

To register the Title to Certain Land

The above entitled matter was set to be heard on December 8, 1986, and was continued by agreement to December 15, 1986, at which time it was heard by the undersigned judge of District Court.

James M. Neilson, Esq. 118 East Main Street, Anoka, MN. 55303, appeared on behalf of the Applicants, Stanley M. Mrosak and Delores A. Mrosak, in the chambers of the undersigned in Elk River, MN. By agreement, a telephone conference was established with the Defendant, Evan J. Henry, pro se, who was in his residence at Rt. 1, Box 60, Winona, MN. 55937.

Defendant. Evan J. Henry, moved the Court to stay the Judgment entered against Defend-

ant in the amount of $3,175.10 and also moved the Court for a rehearing on Applicants' motion for an Order and Decree ordering the registration of title and boundary lines.

Based upon the memoranda filed herein and oral arguments heard by the undersigned on December 15, 1986, IT IS HEREBY ORDERED:

1. Defendant's motion to stay the money judgment of $3,175.10 is hereby granted. This stay shall be in effect only until the Order and Decree has been filed in the above entitled matter. The stay shall be automatically lifted upon the filing of Order and Decree in the above entitled matter.

2. Defendant's motion for a rehearing is denied.

3. Applicants' motion for entry of the Order and Decree is granted.

BY THE COURT:

(Signed) Robert B. Danforth
Judge of District Court
Tenth Judicial District

Dated this 16th day of
December, 1986.

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

In the Matter of the Application of Stanley M. Mrosak and Delores A. Mrosak, as joint tenants, to Register the Title to Certain Land

T-2820

(Defendant's)
MOTION FOR AMENDED FINDINGS
AND NOTICE OF MOTION
(Re award of attorney fees)

WHEREAS -

1. On March 10, 1986, Applicants served Defendant with a copy of the Clerk's Notice and a copy of the Court's ORDER FOR JUDGMENT AND MEMORANDUM dated February 14, 1986 and filed February 28, 1986 by mail:

2. District Court Rule 52.02 (re motion for amended findings) and District Court Rule 59.03 (re time for motion) require that motion for amended findings must be served within 15 days after service of notice by a party of the filing of the order;

3. District Court Rule 6.05 allows three additional days for a party to act where service is by mail;

4. The time for service and filing of a motion for amended findings has not yet expired;

THEREFORE Defendant moves the Court to recind its order of February 14, 1986 wherein Defendant is ordered to pay Applicants $3,175.10 for attorney fees incurred pursuant to Minn. Stat. 549.21.

The grounds for this motion are that Defendant's concerns for the marketability of his property (Lot 18, Auditor's Plat No. 4) are genuine based on the failure of the Examiner of Titles to reconcile alleged errors in Auditor's Plat No. 4 with the Examiner's description of subject property which violates the description of Lot 18 - and that this concern is confirmed by Defendant's attorney who recently advised Defendant that unless the description of subject property is corrected, the marketability of Defendant's title to Lot 18 will be destroyed. A copy of that letter of advice from Defendant's attorney is attached hereto.[1/]

1/ See attached photocopy of letter dated March 15, 1986 from William A. Lindquist, Attorney at Law, to Defendant.

Whereas the subject property is described in the deed of distribution to Stanley M. Mroaak of November 5, 1982[2/] as "Lot seventeen (17), Auditor's Plat No. Feur (4), according to the plat thereof on file or of record in the Office of the Register of Deeds" and has been so described in all previous transfers of record, the REPORT OF THE EXAMINER OF TITLES of January 11, 1983[3/] completely ignores this in his report. Instead of reconciling this description with that shown in Applicants' survey[4/] by disclosing with specificity errors

2/ See attached photocopy of DEED OF DISTRIBUTION BY PERSONAL REPRESENTATIVE PURSUANT TO ORDER OF DISTRIBUTION of November 5, 1982.

3/ See Defendant's BRIEF IN SUPPORT OF MOTION FOR AMENDED FINDINGS OR IN THE ALTERNATIVE A NEW TRIAL of March 17, 1986, Exhibit 8. (Report of Examiner of Titles dated January 11, 19

4/ See Exhibit 7, id. (Survey of subject property by Lot Survey Company of August 12, 1983)

in either Auditor's Plat No. 4 or Applicants' survey, the Examiner accepts unconditionally the description shown in Applicants' survey and in so doing, violates Minn. Stat. 508.13 which requires the Examiner "to proceed to examine into the title of the land described in the application, and into the truth of all matters set forth therein and fully investigate all facts pertaining to the title which ~~amy~~ may be brought to his notice, and shall file in the case a full report thereof, together with his opinion upon the title".

To find Defendant guilty of bad faith in opposing Applicants' registration of their property and to order him to pay any of Applicants' attorney fees under the above conditions, is not in accordance with the facts or the law and therefore the Court's order should be recinded.

Respectfully submitted,

(Signed) Evan J. Henry, Defendant

Dated: March 25, 1986

NOTICE OF MOTION

TO: Babcock, Locher, Neilson & Mannella, At Attorneys for Applicant Stanley M. Mrosak and Delores A. Mrosak

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for hearing before the court in the Sherburne County Courthouse in the City of Elk River, Minnesota on the 4th day of April, 1986 at 1:00 P.M. or as soon thereafter as counsel can be heard. The motion will be based upon all of the records and file herein.

(Signed) Evan J. Henry
Defendant

Dated: March 25, 1986

William A. Lindquist
Attorney at Law
63½ West Fourth Street
Winona, Minnesota 55987
(507) 452 4614

March 15, 1986

Mr. Evan J. Henry
Rt. 1, Box 60
Winona, Minnesota 55987

In re: Application of Stanley M. Mrosak and Delores A. Mrosak - File No. T-2820

Daar Mr. Henry:

At your request, I have reviewed the trial court's findings in the above registration proceeding.

In my opinion, if you cannot obtain an amendment of the findings, your title to Lot 18, Auditor's Plat No. 4, will be rendered unmarketable. This is because the land to be registered is described by metes and bounds and is only noted generally to be a part of Auditor's Plat No. 4. The specific lots affected are not identified. An abstractor confronted with this metes and bounds description in the application will be unable to exactly locate the land on the auditor's plat,

so he will include the application as an entry in your abstract. An abstract examiner will have the same problem. He won't know whether or not the registered title description takes all or part of your lot, so he won't be able to pass title.

You will need to persuade the court to require an amendment of the description to tell exactly where it is located on the auditor's plat. Then, if your lot 18 is not affected you have no problem.

The findings say the underlying description in the auditor's plat are vague and indefinite but the details of the shortcomings are not given. The title examiner's report, which I have also read, does not say what the defects are either. Before the remaining lot owners in Auditor's Plat No. 4 are put to the expense of registration proceedings, it would seem the necessity of abandoning the plat should be convincingly demonstrated in the findings.

The plat should not be discarded lightly.

The very purpose of the auditor's plat was to do away with exactly the lengthy and involved metes and bounds description proposed in this registration proceeding. If there are defects in the plat requiring correction, a new corrected auditor's plat would be a better solution for all.

Very truly yours,

(Signed) William A. Lindquist

WAL:smm

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

In the Matter of the Application of Stanley M. Mrosak and Delores A. Mrosak, as joint tenants, to Register the Title to Certain Land

T-2820

SUPPLEMENT TO MOTION FOR AMENDED FINDINGS OR IN THE ALTERNATIVE A NEW TRIAL

WHEREAS

1. On February 18, 1986, Applicants served Defendant with Copy of Clerk's Notice and copy of Findings of Fact and Interlocutory Order Determining Boundaries dated January 31, 1986 and filed February 5, 1986 by mail:

2. District Court Rule 59.03 provides that notice of motion for a new trial must be served within 15 days after service by a party of the filing of the decision or order;

3. On February 24, 1986, this Defendant served James W. Neilson, Attorney for Applicants, Motion for Amended Findings Or in the Alternative A New Trial and Notice of Motion by mail;

4. The time for service and filing of a motion for a new trial has not yet expired;

THEREFORE this Defendant moves to amend aforesaid motion by adding the following:

1. Paragraph 5 (of the findings) is ambiguous in that it does not identify the survey upon which Applicants rely to describe their property, viz. that made by Lots Survey Company of August 12, 1983 and which was filed in the matter;

2. (Related to location of shed which is no longer relevant).

3. Paragraph 21 which describes the subject property, does not indicate that the lines of description as shown in said survey, correspond with the lines of occupation as they have existed for over 40 years, which they do.

4. Paragraph 21 also incorrectly describes the bearing of the common boundary line dividing Lot 17 (the subject property) and Lot 18 (Defendant's property). While Applicants accept the location of an iron rod as the

southwesterly corner of subject property and the wire fence as the line of occupation dividing Lots 17 and 18, said survey shows such line as bearing N 46°53'54" W as compared to N 47° W, the bearing used to describe such line for over 50 years. The lines of description per said survey being the sameas the lines of occupation, and the latter having been the same for the past 40 years or more, and without any showing in said survey of any property acquired by Applicants by adverse possession, the description of the subject property, for purposes of registration, should continue to be that as shown in Auditor's Plat No. 4 notwithstanding any recently disclosed errors in Auditor's Plat No. 4. To do otherwise, is to needlessly disturb the description of Defendant's Lot 18. A boundary line between adjoining properties, unless fixed by agreement, acquiesce, or adverse possession, is to be determined in accordance with the original government survey. Poch v. Urlaub, 98 NW2d 509, 357 Mich 261.

5. (Related to location of shed which is no longer relevant).

6. (Related to Defendant having to proceed to trial under conditions which Defendant considered unfair, now regarded as no longer relevant).

Thus the foregoing is to supplement Defendant's motion for amendment of the Court's findings for errors contained therein or, in the alternative, a new trial of the matter on its merits.

Respectfully submitted,

(Signed) Evan J. Henry

Dated: March 6, 1986

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

In the Matter of the Application of Stanley M. Mrosak and Delores A. Mrosak, as joint tenants, to Register the Title to Certain Land

T-2820

MOTION FOR AMENDED FINDINGS OR IN THE ALTERNATIVE A NEW TRIAL

Defendant Evan J. Henry moves the court for amendments to the Findings of Fact and Interlocutory Order Determining Boundaries entered herein or in the alternative for a new trial.

The amendments requested and the reason for the amendments are as follows:

1. Paragraph 15 should be deleted on the grounds that it is not justified by the evidence. There was no evidence introduced on the issue of adverse possession whatsoever, no witness testified on the subject. Also paragraph 15 conflicts with paragraphs 7, 16, and 17, which assert contrary possessions. If paragraph 15 is not deleted, then it should be amended to describe with particularity

the portion of property being registered which is claimed by adverse possession in order to demonstrate that the land claimed does not conflict with paragraphs 7, 16, and 17, if that can be done. (If applicants are not claiming any parts of Lots 16 and 18, what land are they claiming by adverse possession? The sole adjoining land to applicants' Lot 17, is Lots 16 and 18.)

2. Paragraph 17 should be deleted on the grounds that it is not justified by the evidence. If this finding is not deleted, it should be amended to identify that portion of the premises being registered which are encroached upon. Unless this is done, it conflicts with the finding in paragraph 15.

3. Paragraph 21 should be deleted on the grounds that there is not sufficient evidence to support the finding and that the findings, if paragraph 15 is deleted, are insufficient to support the conclusion.

4. Paragraph 23 should be amended to identify land to which applicants have good record

title, to which defendant's failed claim of adverse possession applies.

5. In the alternative, defendant moves for a new trial on the grounds that the decision is not justified by the evidence and is contrary to law.

(Signed) Evan J. Henry,
Defendant

Dated: February 24, 1986

NOTICE OF MOTION

TO: Babcock, Locher, Neilson & Mannella, Attorneys for Applicant Stanley M. Mrosak and Delores A. Mrosak

PLEASE TAKE NOTICE that the undersigned will bring the above motions on for hearing before the court in the Sherburne County Courthouse in the City of Elk River, Minnesota on the 17th day of March, 1986 at 1:30 o'clock in the afternoon or as soon thereafter as counsel can be heard. The motions will be based upon all of the records and file herein.

(Signed) Evan J. Henry,
Defendant

Dated: February 24, 1986.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

In the Matter of the Application of

Stanley M. Mrosak and
Delores A. Mrosak, husband and wife, as joint tenants File No. T-2820

To register the Title to Certain Land

ORDER FOR JUDGMENT AND MEMORANDUM

The above entitled action was tried to the Court without jury on January 27, 1986, at the Anoka County Courthouse, Anoka, Minnesota. The Applicant appeared in person and by his counsel Mr. James M. Neilson and Mr. Stephen J. Nash. The Defendant Evan Henry appeared in person pro se.

PROCEDURAL HISTORY

The Applicant commenced a torrens proceeding in Anoka County alleging that lot in Auditor's Plat No. 4 contained faulty legal descriptions. The purpose of the torrens proceeding was to register boundaries. At no time was there an attempt to claim additional

land over and above that actually occupied for over 30 years.

The Defendant Henry answered by way of a motion to dismiss, claiming that Auditor's Plat No. 4 was "defensible". Henry owned a lot adjacent to that of the Applicant.

At the trial which lasted two days, the Applicant offered evidence by way of a county surveyor and an independent surveyor that proved by the preponderance of evidence that in fact the judicial setting of boundaries under the torrens procedure was proper and necessary. At the close of the trial the Defendant Henry also stated that he too was satisfied with what he had heard and would not contest the matter any longer.

The Court then considered the matter of the Applicant's motion pursuant to 549.21 to award Applicant attorney fees and other costs. After hearing testimony from the parties and accepting into evidence the exhibits offered by the Defendant Henry, the Court took the matter under advisement.

The Court has considered the entire file, the trial testimony, written memoranda and all exhibits entered into evidence.

Based upon the foregoing, the Court makes the following:

ORDER FOR JUDGMENT

The Court Administrator shall enter judgment which shall state the Applicant Mrosak shall have and recover from the Defendant Evan Henry as and for attorney fees the sum of $3,175.10 pursuant to MS 549.21. This sum awarded does not preclude the taxing of costs and disbursements that would ordinarily be allowed or taxed by the Court Administrator.

The attached memorandum is made part of this Order and shall be deemed to support it. Factual findings and legal conclusions shall be deemed to be part of said Order.

Entry of judgment is stayed for 30 days.

(Signed) Robert B. Danforth
District Judge

Dated this 24th day
of February, 1986.

M E M O R A N D U M

I. General Discussion of M.S. 549.21

Minnesota Statute 549.21 allows the court to award attorney fees and other expenses when a party has "acted in bad faith". The general rule is that such expenses may not be awarded a litigant simply because he is successful. A contrary rule would have a chilling effect upon potential litigants and the entire judicial system. Minnesota, however, does have the statutory exception which will allow attorneys fees where the unsuccessful party "acted in bad faith, vexatiously, wantonly or for oppressive reasons." Fownes v. Hubbard Broadcasting, Inc., 246 NW2d 700 (1976).

In the case at bar, the Applicant filed and served notice of their intent to seek litigation expenses on October 17, 1985. The issue is therefore properly before the Court.

The Court must therefore balance on the one hand the consideration that a litigant not abuse the judicial system by acting in bad faith, and the other consideration that

potential litigants be allowed their day in court.

Procedurally the statute does not state how the court should proceed in deciding a "bad faith" question. The Court, therefore, has choosen to decide the principal issue (that of the torrens case) first and took under advisement the instant issue. In making its ruling, the Court considered the file, record, arguments, testimony and exhibits offered, as well as all arguments of counsel and Mr. Henry.

DISCUSSION OF EVIDENCE OF BAD FAITH IN THIS CASE

The Court would like to make it clear from the outset that the basis of its finding of bad faith in this case centers around gross negligence of the Defendant and not bad faith in the usual sense of the word. A careful review of the file and exhibits and the record does not reveal that the Defendant acted "vexatiously, or wantonly or for oppressive reasons." The Court was of the opposite view. The Court can find no malicious motivation by Mr. Henry, nor was the nature of his defense based upon greed

or profit of any kind.

Mr. Henry chose to "defend Auditor's Plat No. 4" and did so with zeal and determination. His motive for doing so are uncertain because according to expert surveyors, he stood to lose rather than gain from such a position. Nevertheless, he chose to litigate and his motives will not be inquired into any further.

This Court's decision as to bad faith rests primarily upon the gross negligence of the Defendant during the cause of action and what amounted to a frivolous defense for no apparent reason other than principle. The Defendant was served with the Summons and Complaint in February, 1985, and served his Answer on or about February 27, 1985. The files and record is replete with correspondence back and forth between Henry and the Applicant as well as others containing all sorts of reference to the problem the torrens action was supposed to cure.

The County Surveyor even sent a detailed sketch to Henry showing him the problem as he saw it and Henry was told to get legal or other

professional advice by the County Surveyor as well as others. Instead of securing his own surveyor or seeking legal advice, Henry s ent the independent surveyor's survey in to the State Surveyor's Association who treated it as a complaint. Obviously the people to whom he directed the inquiry are not in the business to render an independent opinion. Henry would have to pay for that. Henry, although acting pro se, was not in litigation for the first time. The record shows that he was a successful litigant in a rate increase case against Northwestern Bell. He knew or should have know that he was dealing with a problem far beyond his level of expertise, and if he genuinely believed he was a potential aggrieved party, he should have sought the services of a qualified surveyor, a real estate attorney, or both. This Court does not suggest that Henry had to have either to defend him or aid in his defense. He had an absolute right to act pro se.

What he should have done and was grossly

negligent for not doing was to seek the advice of a surveyor or attorney. The surveyor and/or attorney could have easily talked with the attorney for Applicant, the County Surveyor and the independent surveyor and rendered an opinion to Henry. That could have been done at any time during the proceedings; right after being served with the pleadings; right up to trial. Instead, Henry relied on the trial to educate himself. After all of the evidence was in and the experts gave their opinion, Henry agreed with their conclusions. This Court is of the opinion that Henry was legally obligated, once he decided to litigate, to ascertain what his position should be. The only way he could have accomplished that was to, a) obtain expert opinion, or b) force the Applicant to go to trial and prove his case by a preponderance of evidence and become "educated at the Applicant's expense." Unfortunately, Mr. Henry chose the latter course despite warnings of bad faith and advice from attorneys and others that he pro-

ceed in a different fashion.

The Court at this point realizes that the statute does not expressly provide that gross negligence is one of the elements of 549.21. This Court is relying in part upon Wright, Miller and Kane, Federal Practice and Procedures, Civ 2d (1983) paragraph 2675, pp 288-289 which state in part, "Gross negligence or obdurate conduct during the course of an action also could support a finding of bad faith." After a careful review of the record, the Court is satisfied that the Defendant Henry acted in a grossly negligent manner.

Although the statute is not clear as to what burden of proof is required, this Court is satisfied that the facts and circumstances demonstrate the above clearly and convincingly, and certainly by the greater preponderance of evidence, the bad faith by virtue of said gross negligence of the Defendant Henry in this litigation.

In summary, the Defendant, once he elected to litigate, had an obligation to secure ex-

pert opinion pertaining to the boundary line problem he shared with Applicant and which was the subject of the torrens action. He did not do so.

In addition, if the Defendant was going to seriously question the legality of the proceedings or their effect on him, he should have consulted with an attorney. He did not do so.

DISCUSSION OF MONEY DAMAGES TO APPLICANT

This Court does not adopt the view expressed by the Applicant that the Defendant is liable for all of the attorney fees expended by virtue of his litigating the case. The Court can find no evidence of gross negligence that would equate bad faith in the initial stages of the proceedings. The file is replete with attempts by Henry to communicate with the Applicant, and in fact there are numerous letters going back and forth between Henry and the Applicant and County Surveyor and others that show that the Defendant was not attempting to harrass anyone and was genu-

inely interested in the proceedings.

However, in October Henry was served with a Certificate of Readiness for trial by the Applicant which should have alerted him to the fact that he had to be ready for trial. He then received a notice claiming bad faith which should have further put him on notice that he had an immediate and urgent obligation to assess his legal stand.

Instead of seeking the proper advice, Henry filed a Certificate of Non-Readiness and served interrogatories which were directed to the bad faith issue. The matter was placed on the trial calendar for December 9, 1985, and then continued to January 27, 1986. From October 17th, the date Henry received the first official notice that a trial was to commence on January 27, 1986, he sought no legal or survey advice and came to court representing himself with no witness other than himself. At trial Henry did not object to the boundary line that was to be used. In fact he agreed to it. He merely was against torrensing the

property line because he felt obligated to defend the Auditor's plat.

This is not a case where the Defendant is fighting an established order on principle alone. Instead, this is a case of a man and wife who were told that they had boundary problems and who were given professional advice about how to cure those problems. When they sought to do so, they were met by Mr. Henry who decided to contest their torrens application. Unfortunately, he litigated too long without attempting to correctly assess his position and that amounts to gross negligence.

Mr. Henry was grossly negligent when, after receiving the Certificate of Readiness and notice of bad faith, he did nothing affirmative to assess his legal position for a period of three months.

It is these three months legal fees as well as trial fees amounting to $3,175.10 that this Court has decided that Mr. Henry must pay. The Court has reviewed the ledger sheet submitted and the evidence adduced and considers

such fees reasonable.

(Signed) Robert B. Danforth
District Judge

Dated: February 24, 1986

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

In the Matter of the Application of

Stanley M. Mrosak and
Delores A. Mrosak, husband and wife, as joint tenants. T-2820

To Register the Title to Certain Land

FINDINGS OF FACT[1/] AND
INTERLOCUTORY ORDER
DETERMINING BOUNDARIES

The above entitled matter came on for trial on January 27, 1986 before the Honorable Robert B. Danforth, Judge of the above named Court, without a jury, at the Courthouse in the City of Anoka, said County and State; James M. Neilson, Esq., appearing for the applicants, Stanley M. Mrosak and Delores A. Mrosak; and the defendant, Evan J. Henry, appearing Pro Se; and the Court having duly considered the Application and any amendments thereto, the Report or Reports of the Examiner of Titles and the evidence adduced by the

---

1/ Various findings not related to this petition have been omitted, viz. 3, 4, 8, 9, 10, 11, 12, 13, 14, 19, 22 and 23.

Applicants, makes the following FINDINGS:

1. That all the requirements of the law in respect to the Application and any amendments thereto have been complied with and that all of the defendants in this proceeding have been duly served with process as required by law or have consented to the registration herein and it further appears that no Answer or Notice of Appearance has been filed in this proceeding, except the appearance of Evan J. Henry at trial;

2. That, except as hereinafter provided, none of the defendants named in the Summons and any amendments or supplements thereto, have any right, title, estate, lien or interest in the real estate hereinafter described;

5. That the applicants desire to register the northeasterly, southeasterly and southwesterly boundary lines. That the applicants have had the land involved herein surveyed by Lot Surveys Company, Land Surveyors, of Brooklyn Park, Minnesota, and have previously filed herein a plat of said survey showing the boundary

of said premises claimed by the applicants and that said boundary lines are as shown upon said plat.

6. That the applicants' deed of record, dated December 15, 1982, recorded December 16, 1982 as Anoka County Recorder Document No. 603757, contains an indefinite legal description referred to as "Lot 17, Auditor's Plat No. 4.". That "Auditor's Plat No. 4" recorded July 17, 1934 in Book E of Plats on Page 16 in the office of the Anoka County Recorder, is an Auditor's Subdivision established under Minn. Stat. 272.19 ~~k72.19~~ and is not a surveyed plat established under MINN. STAT. Chapter 505. That the underlying legal descriptions for Lots 16, 17 and 18, "Auditor's Plat No. 4", are vague and indefinite. That the lots as shown in the plat of "Auditor's Plat No. 4", do not correspond to the lots as actually occupied by the individual lot owners.

7. That the occupant of Lot 16, "Auditor's Plat No. 4" is Mary K. Tills.

15. That as to any portion of the property

being registered herein to which applicants do not have good record title, Applicants and their predecessors in interest have acquired title thereto by adverse possession, by occupying it for 15 years in a manner which was actual, open, continuous, hostile and exclusive, and accompanied by an intention to claim adversely.

18. That the southeasterly line of the property being registered herein, runs along the northwesterly line of Crooked Lake Lane; and that said Crooked Lake Lane is open and in use.

20. That if any part of the property being registered includes part of the bed of Crooked Lake, a meandered lake, that said property has been acquired by the applicants by accretion or reliction.

21. That Stanley M. Mrosak and Delores A. Mrosak, husband and wife, as joint tenants, whose post office address is 3900 Bassett Creek Drive, City of Golden Valley, County of Hennepin, State of Minnesota, are the owners of an estate in fee simple described as follows:

That part of Governemnt Lot 2, Section 4, Township 31, Range 24, Anoka County, Minnesota, described as follows:

Commencing at the intersection of the South line of said Government Lot 2 and the westerly line of Crooked Lake Boulevard, a distance of 535.70 feet West of the southeast corner of said Government Lot 2; thence North 3 degrees 20 minutes West, along said westerly line of Crooked Lake Boulevard, a distance of 35.14 feet; thence North 14 degrees 09 minutes East, continuing along said westerly line of Crooked Lane Boulevard, a distance of 35.14 feet; thence North 14 degrees 09 East, continuing along said westerly line, a distance of 605.65 feet; thence South 47 degrees 50 minutes West, a distance of 488852 feet; thence South 65 degrees 19 minutes West, a distance of 99.50 feet; thence North 33 degrees 53 minutes 30 seconds West, a distance of 25.33 feet; thence North 65 degrees 19 minutes East, a distance of 100.00 feet; thence North 47 degrees 50 minutes East, a distance of 135.25 feet to a Judicial Landmark set pursuant to Torrens Case No. T-2192; thence North 47 degrees 15 minutes 00 seconds East, a distance of 135 feet to the actual point of beginning of the tract of land to be herein described:

thence continuing North 47 degrees 15 minutes 00 seconds East, a distance of 67.50 feet; then North 52 degrees 13 minutes 04 seconds West, a distance of 243 feet more or less, to the shore of Crooked Lake; thence southwesterly, along said shore to the intersection with a line bearing 46 degrees 53 minutes 54 seconds West from the actual point of beginning; thence South 46 degrees 53 minutes 54 seconds East, a distance of 244 feet more or less, to the actual point of beginning. 1/

1/ 80a-81a

Said tract is also known as part of "Auditor's Plat No. 4".

23. That the Defendants have not sustained their burden of proof to show that the Defendants or their predecessors in title have occupied any portion of said premises involved in this proceeding openly, continuously, exclusively, notoriously and hostilely for more than 15 years in order to prove adverse possession to any portion of said premises.

IT IS THEREFORE ORDERED, That the Applicants proceed to have said surveyor mark said boundary lines by placing Judicial Landmarks, and that a plat of said survey showing the location of said Judicial Landmarks, certified as to location thereof by said surveyor, be then filed herein.

Dated this 31st day of January, 1986.

(Signed) Robert B. Danforth
Judge of District Court

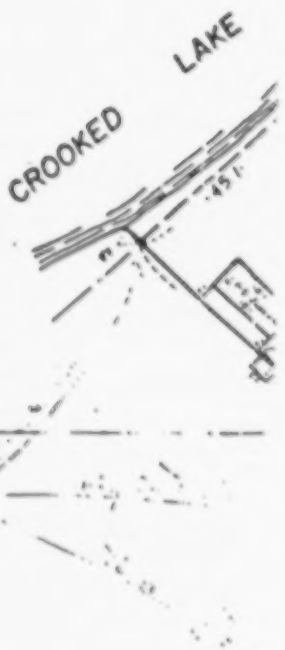
GERALD T. COYNE
300 BRUNSWICK AVE S
GOLDEN VALLEY, MINN.
MINN. REG. NO. 4741

LC

Invoice #12277
P.B. 233-38
Scale 1 inch = 20'
o Denotes Iron Monument

SURVEY FOR
STANLEY MRO

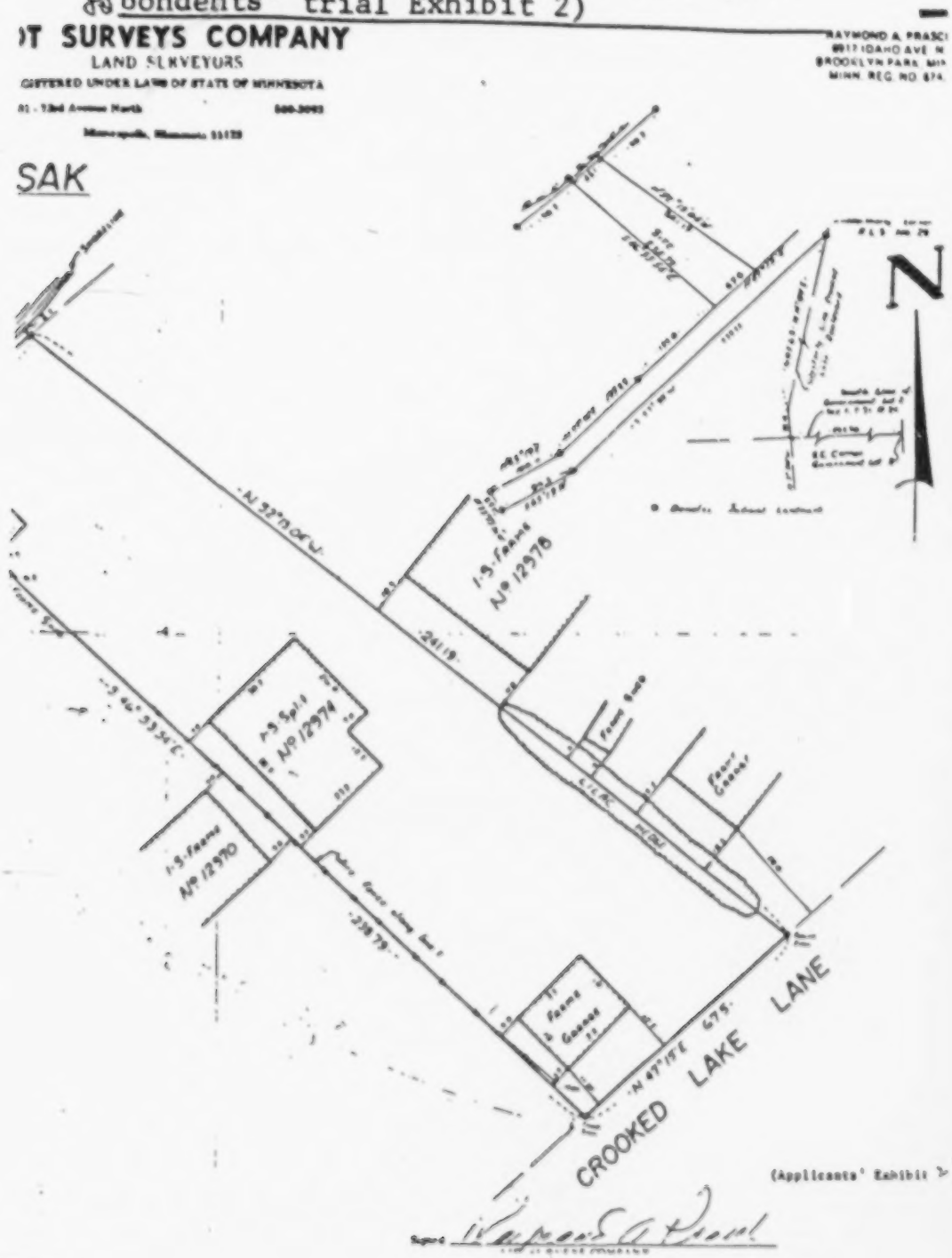
That part of Government Lot 2, Section 4, Township 31, Range 24, Anoka County, Minnesota described as follows:
Commencing at the intersection of the South line of said Government Lot 2 and the Westerly line of Crooked Lake Boulevard, distant 333.70 feet West from the Southeast corner of said Government Lot 2; thence North 3 degrees 20 minutes West along said Westerly line of Crooked Lake Boulevard, a distance of 33.14 feet; thence North 34 degrees 09 minutes East continuing along said Westerly line a distance of 605.64 feet; thence South 47 degrees 50 minutes West a distance of 438.52 feet; thence South 84 degrees 19 minutes West at distance of 99.50 feet; thence North 33 degrees 57 minutes 30 seconds West a distance of 25.33 feet; thence North 84 degrees 19 minutes East a distance of 100.00 feet; thence North 47 degrees 50 minutes East 133.25 feet to a Judicial Landmark set pursuant to Torrens Case No. T-2197; thence North 47 degrees 13 minutes 00 seconds East 133.00 feet to the point of beginning of the tract of land to be herein; thence North 47 degrees 13 minutes 00 seconds East 67.50 feet; thence North 52 degrees 13 minutes 34 seconds West 34 feet more or less to the shoreline of Crooked Lake; thence Southwesterly along said shoreline to its intersection with a line bearing North 34 degrees 13 minutes 34 seconds West from the point of beginning; thence South 34 degrees 13 minutes 34 seconds East to the point of beginning.



I hereby certify that this is a true and correct representation of a survey of the boundaries of the above described land and the location of all buildings and visible encroachments, if any, made on said land.

(14th August, 1981)

Survey of respondents' property by Lots Survey Company, August 12, 1983. (Respondents' trial Exhibit 2)



(Applicants' Exhibit 2)

AUDITOR'S PLAT

ANOKA COUNTY, MINN.

No. 4.

I, E A Carlson, Auditor of Anoka County, Minnesota, do hereby certify that Wayne L. Rupp, County Surveyor of said County, at my request surveyed and platted the property designated by this plat as and platted the property designated by this plat as "Auditor's Plat No. 4" in pursuance of Chapter 991 of Revised Laws of 1905 and as amended by Chapter 93, Laws of 1917.

E A Carlson
County Auditor

Above certificate subscribed and sworn to before me this 19th day of June 1934.

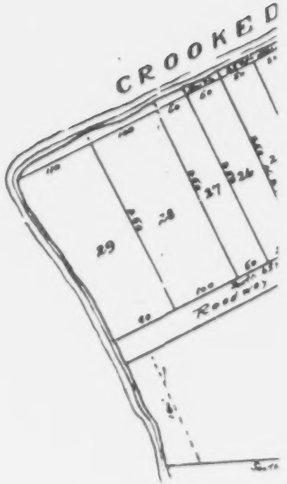
Thos A Nelson
Clerk of District Court,
Anoka County, Minn.

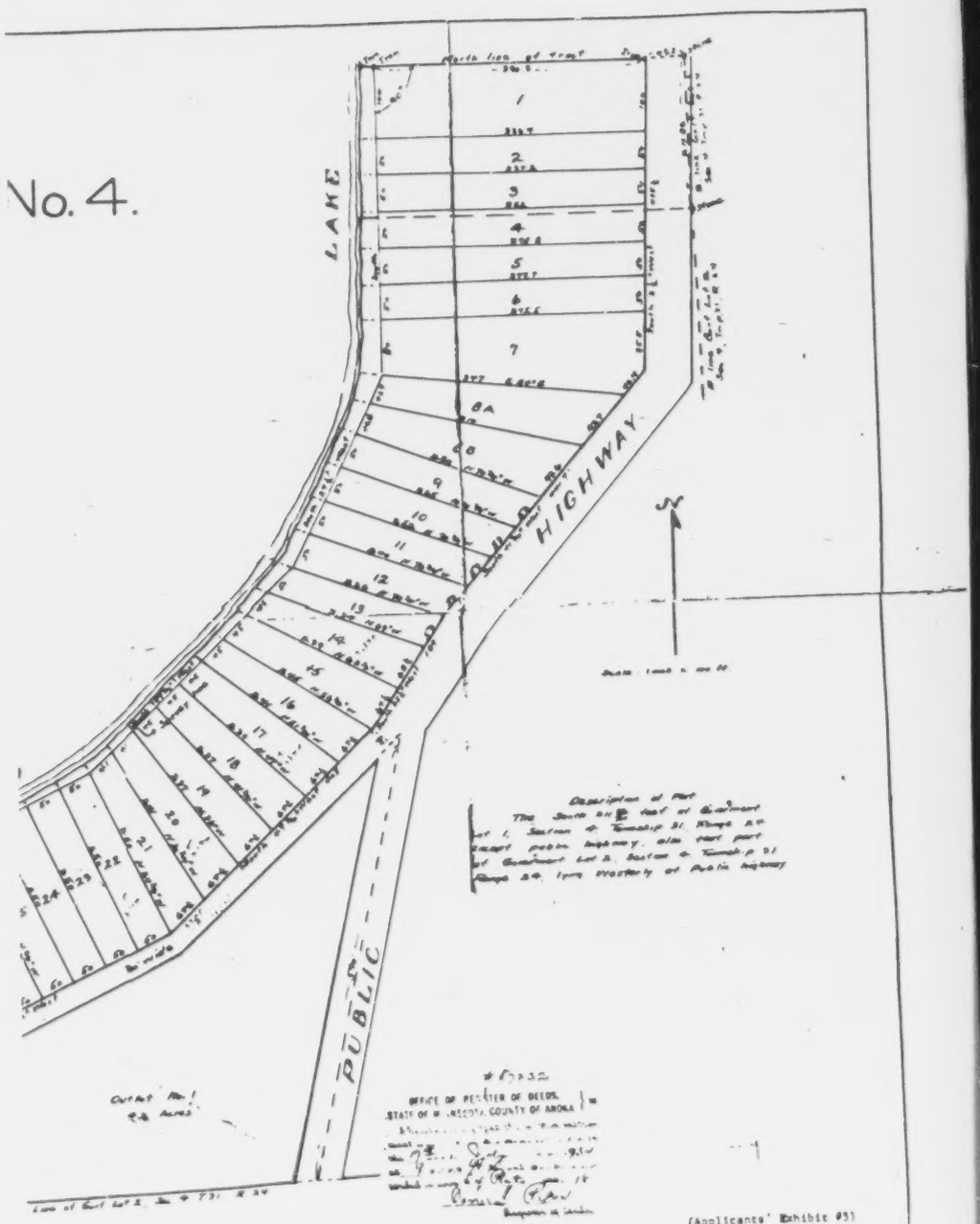
I hereby certify that I have surveyed and platted the property described on this plat as "Auditors Plat No 4"; that the plat is a correct representation of said survey; that all distances are correctly shown on that said survey; that the outside boundary lines are correctly designated on the plat and that there are no other public highways other than as shown thereon

Wayne L Rupp
County Surveyor

Above certificate subscribed and sworn to before me, this 19th day of June 1934.

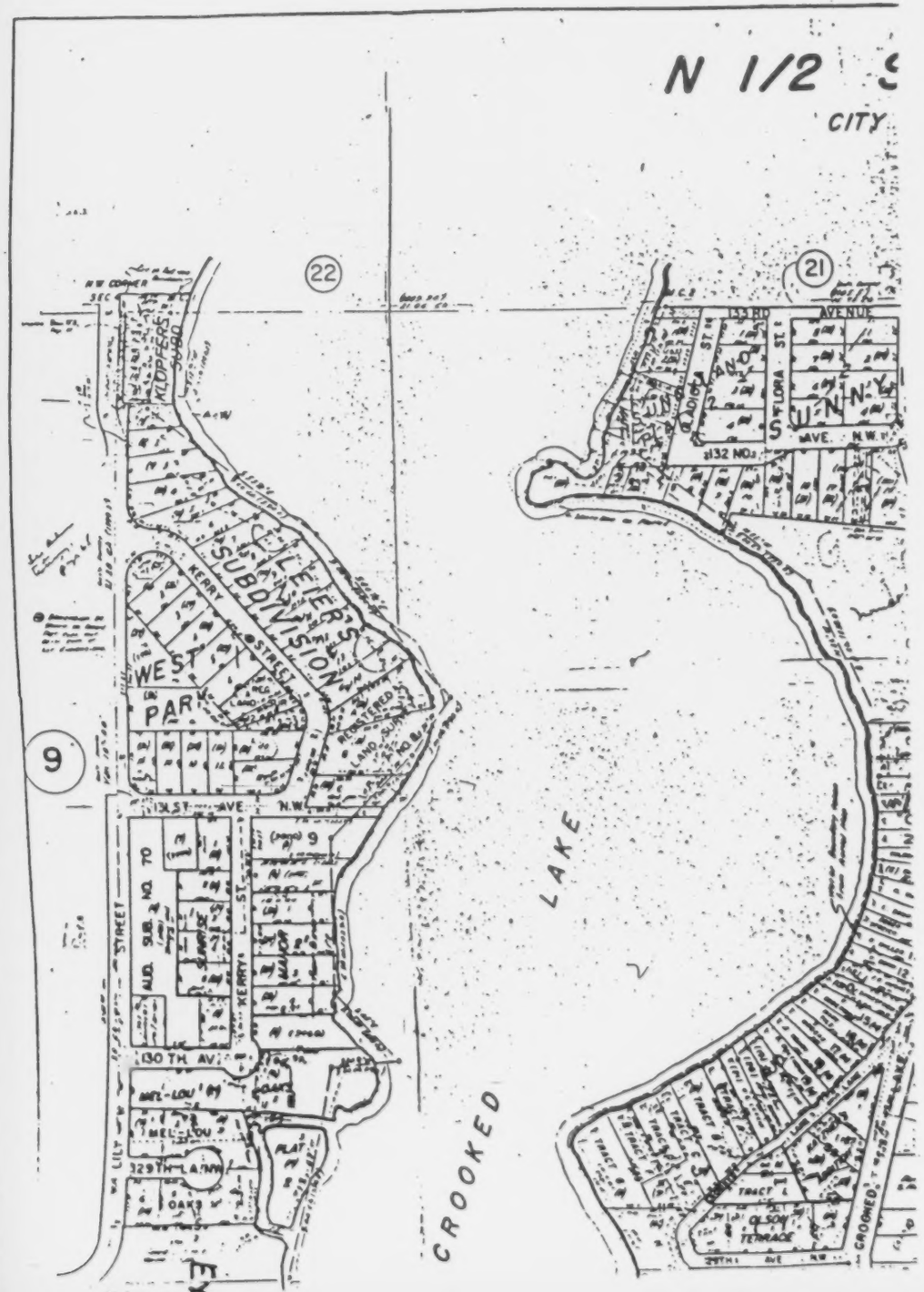
Thos A Nelson
Clerk of District Court
Anoka County, Minn.

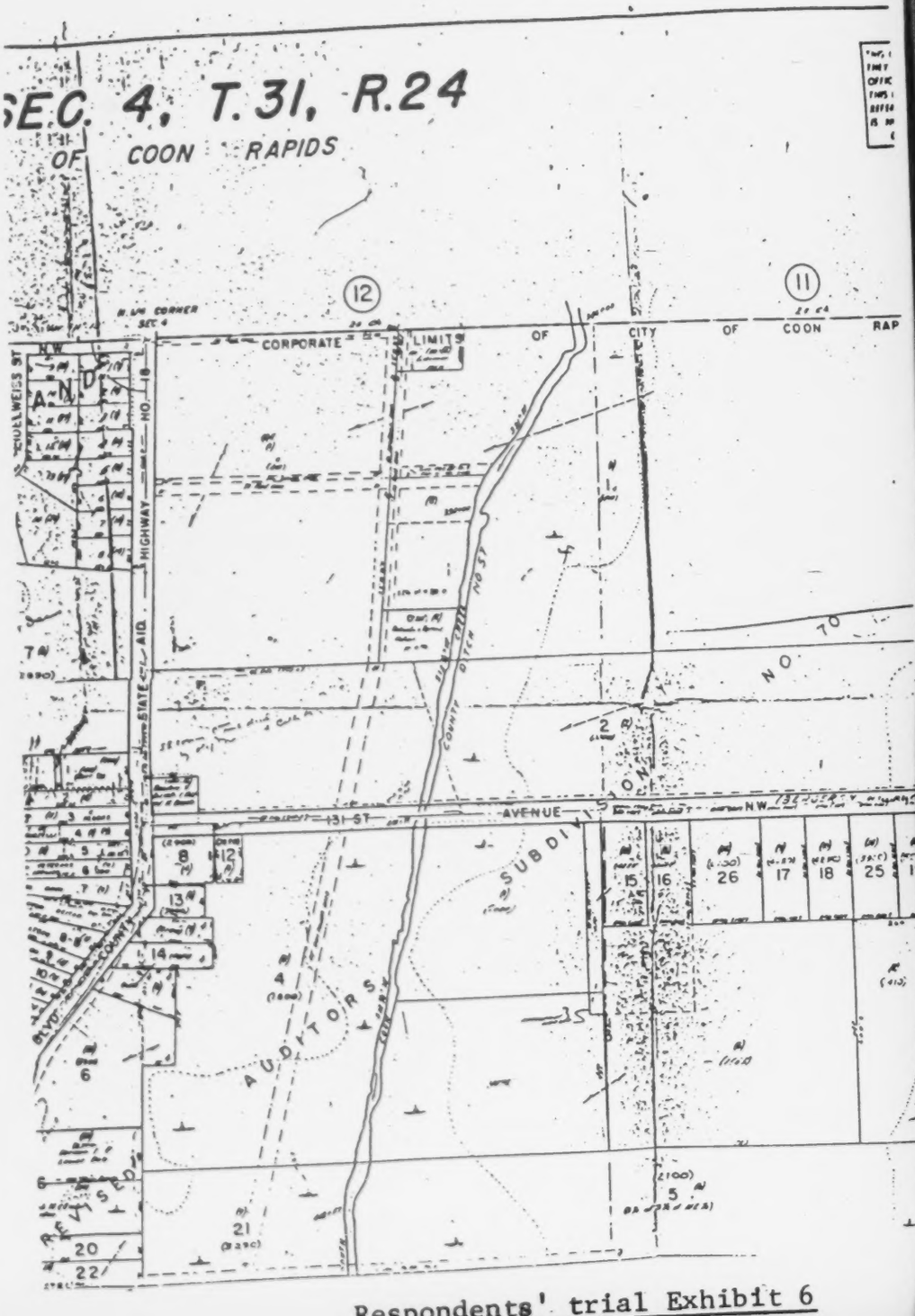




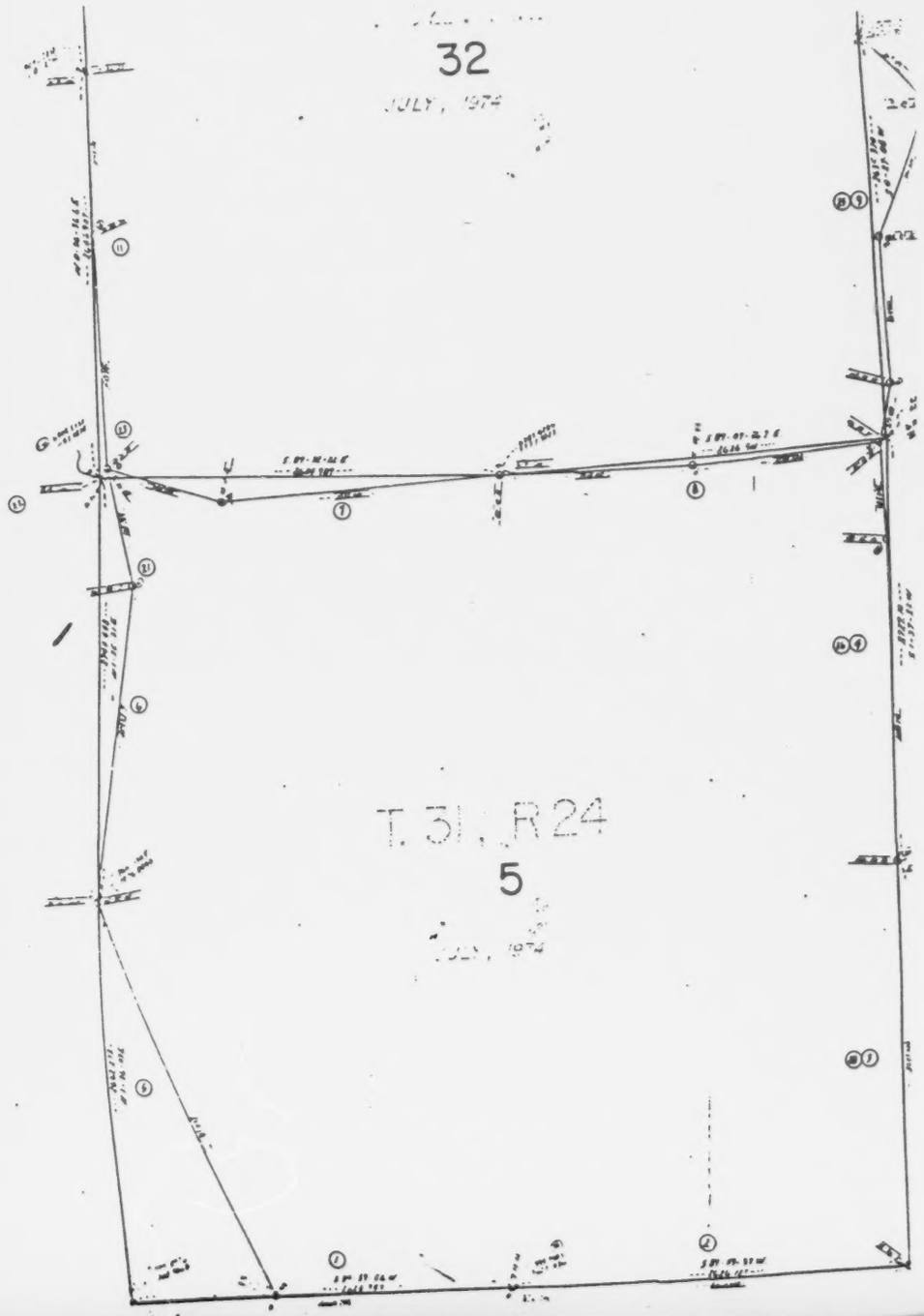
(Applicants' Exhibit #5)

(As reduced from a)
(17" x 26" original)



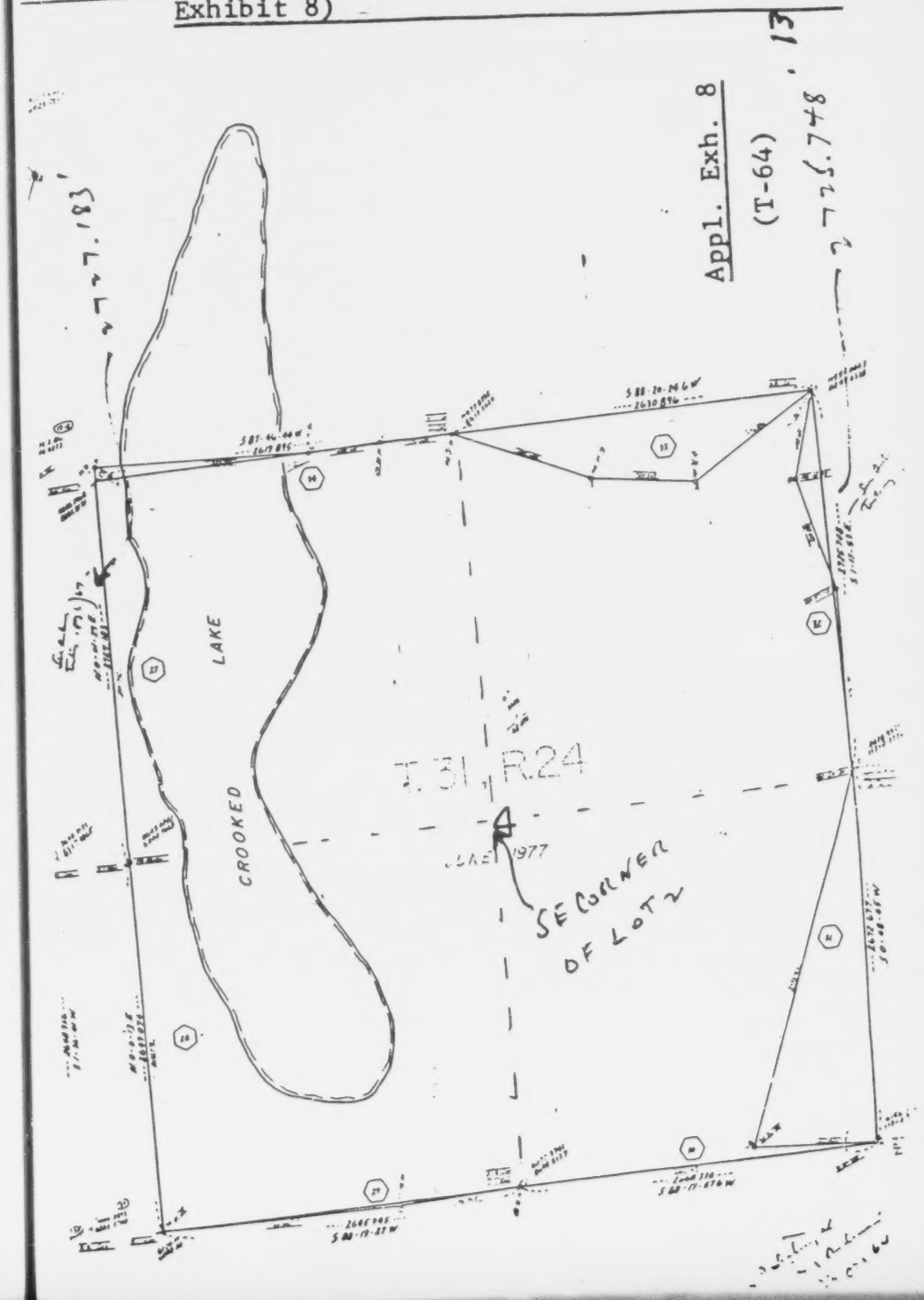


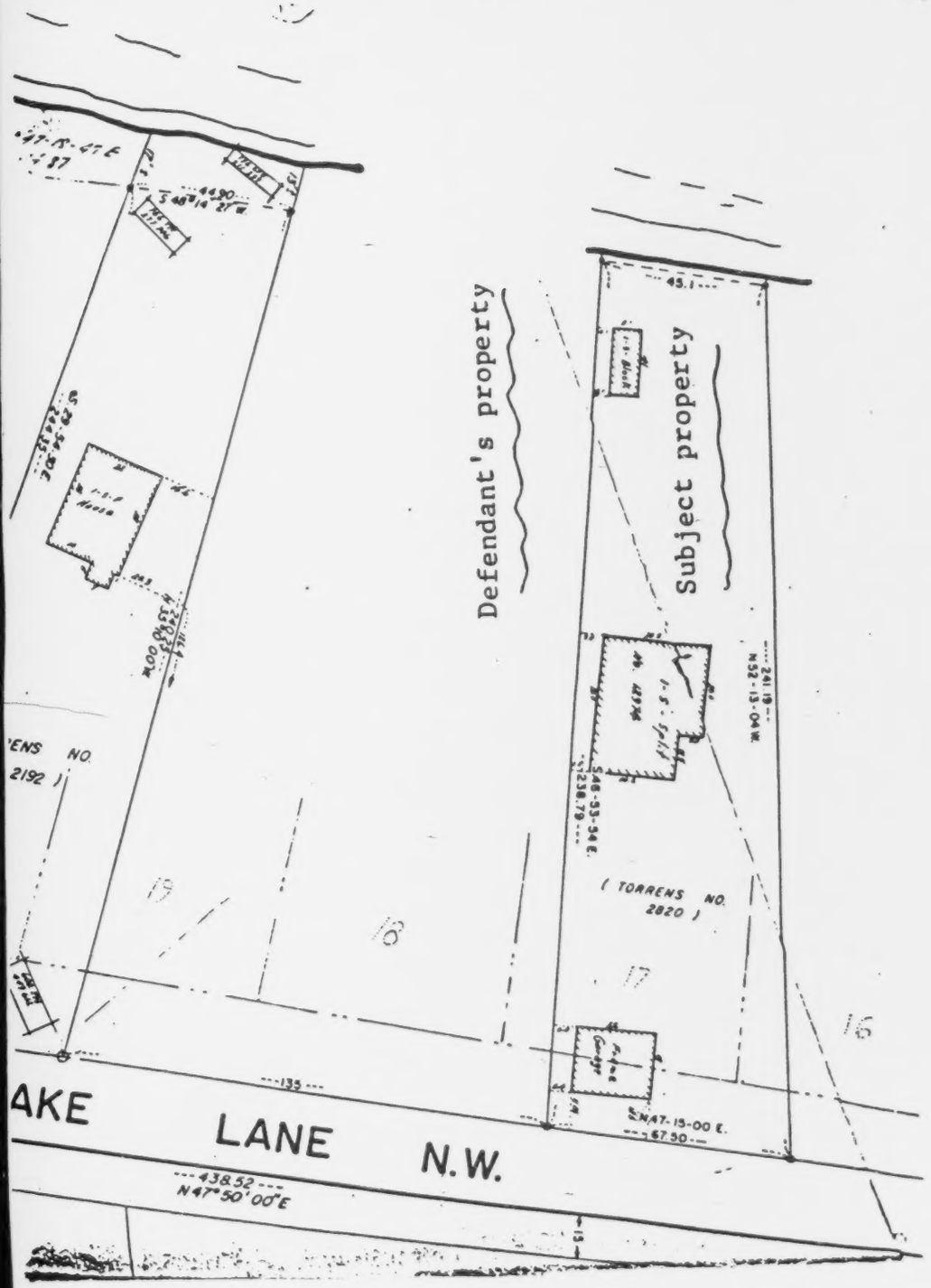
Respondents' trial Exhibit 6



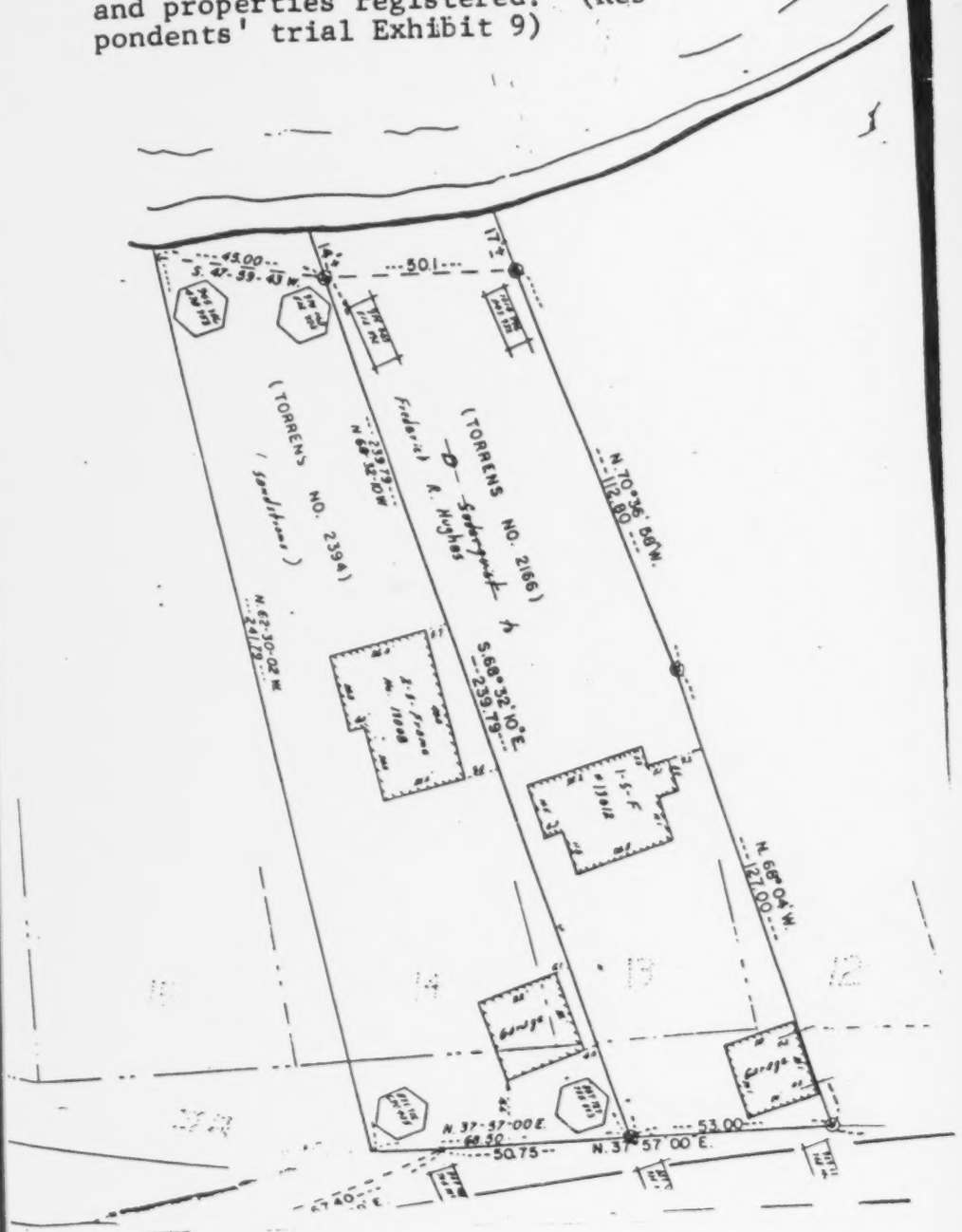
574

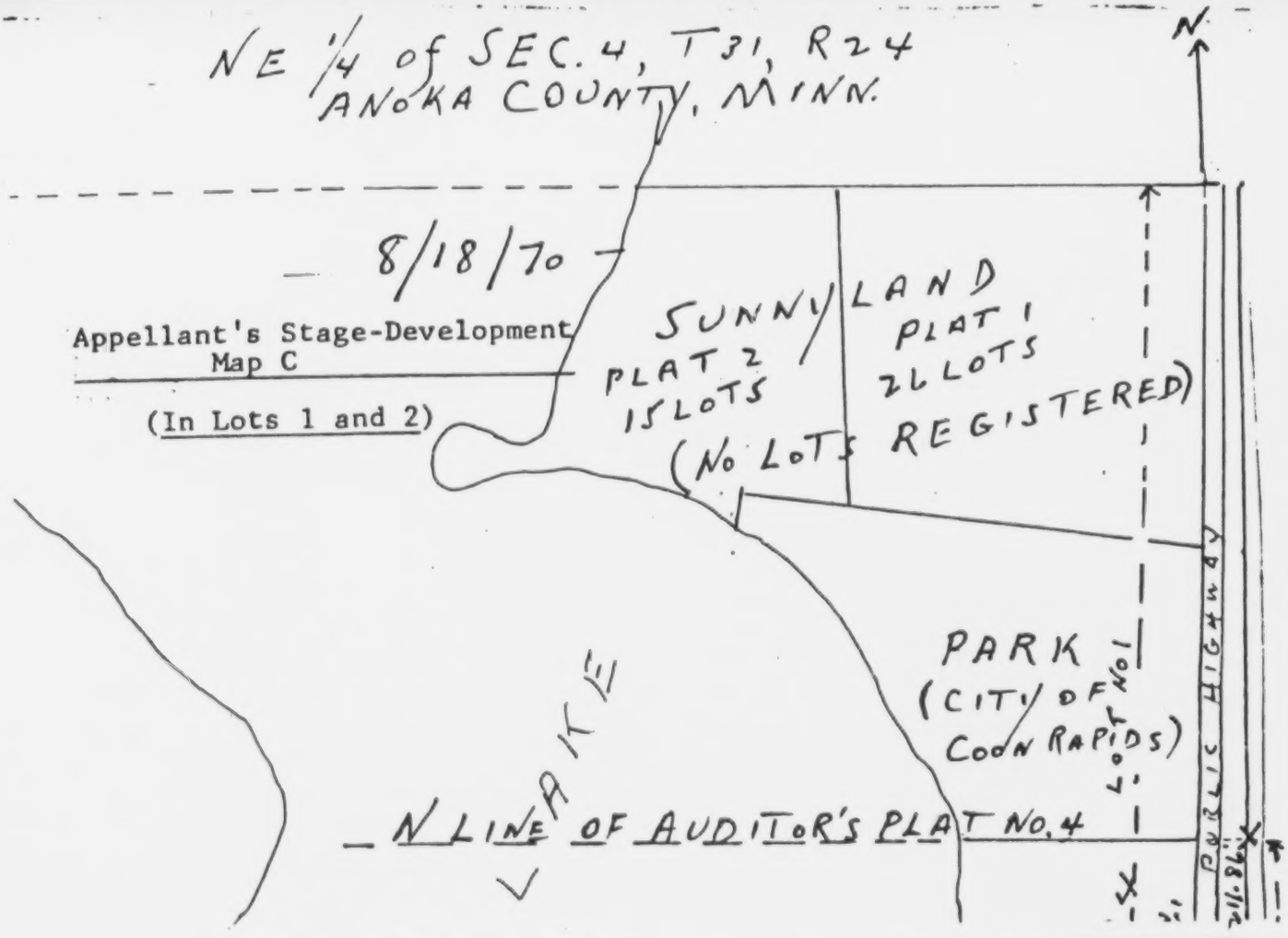
N 1/2 Sec. 4, T. 31, R. 24 showing County Surveyor's measurement of its East line as 2,725.748 feet (Respondents' trial Exhibit 8)

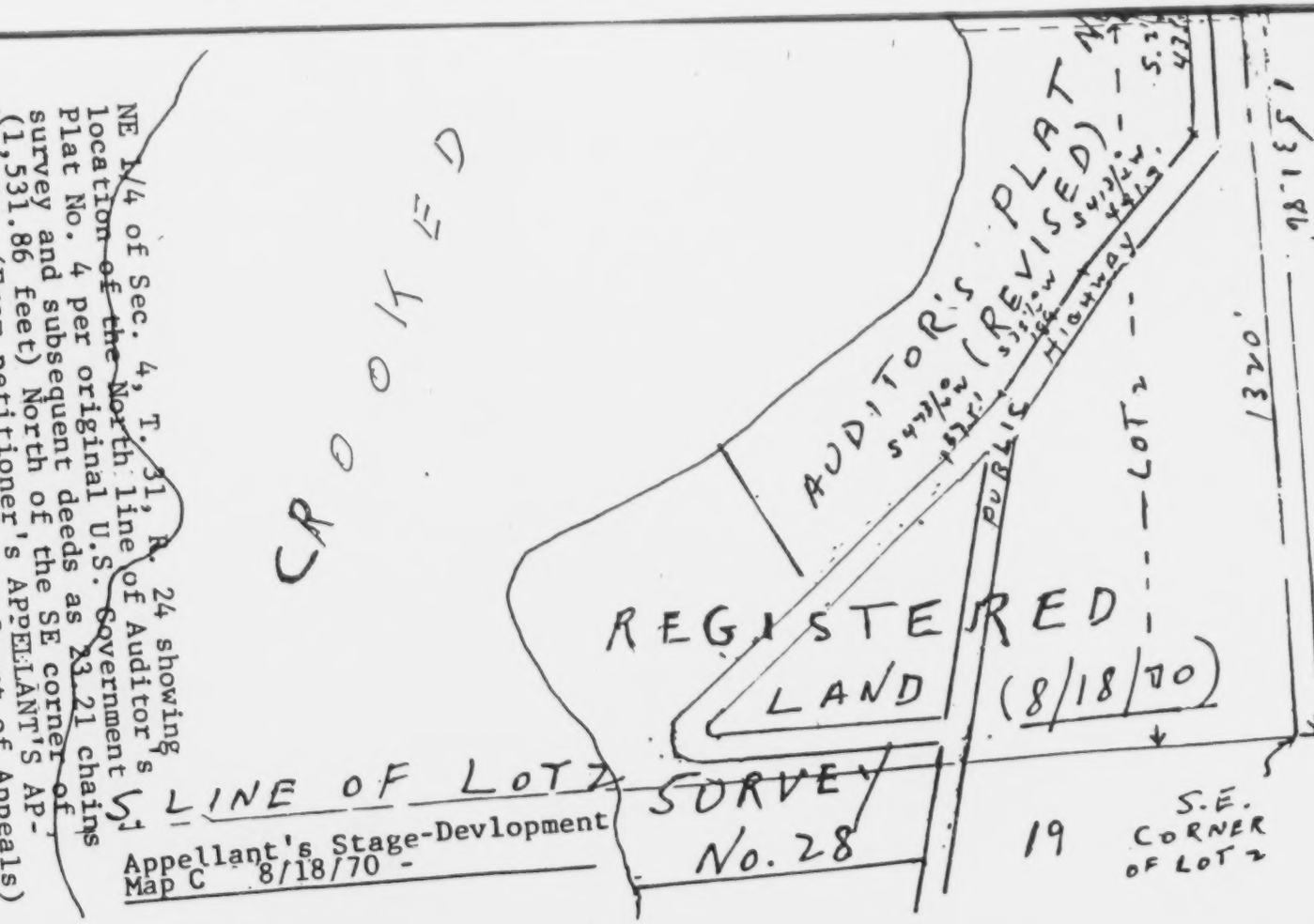




Drawing by County Surveyor of Lots 12, 13, 14, 15, 16, 17, 18, 19, and 20, Auditor's Plat No. 4, showing alleged errors in plat and properties registered. (Respondents' trial Exhibit 9)

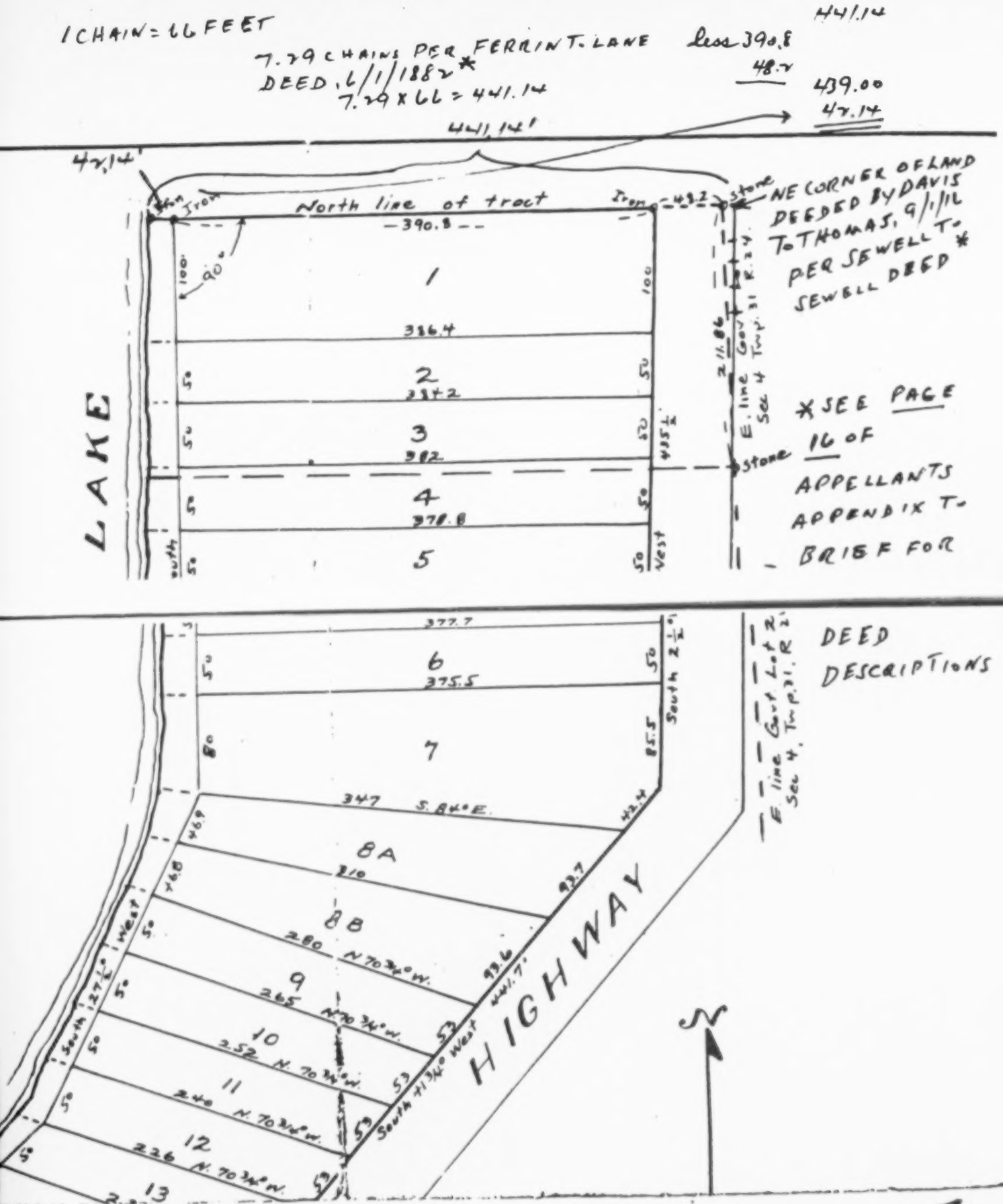






NE 1/4 of Sec. 4, T. 31, R. 24 showing location of the North line of Auditor's Plat No. 4 per original U.S. Government survey and subsequent deeds as 23.21 chains (1,531.86 feet) North of the SE corner of Lot 2. (From petitioner's APPELLANT'S APPENDIX TO BRIEF in Minnesota Court of Appeals)

Excerpt from Auditor's Plat No. 4 Showing Its North Line
(with explanatory insertions)



549.21. Reimbursement for certain costs in civil actions

Subdivision 1. Acknowledgment in pleadings. The parties by their attorneys in any civil action shall attach to and make a part of the pleading served on the opposite party or parties a signed acknowledgment stating that the parties acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties pursuant to subdivision 2.

Subd. 2. Award of costs. Upon motion of a party, or upon the court's own motion, the court in its discretion may award to that party costs, disbursements, reasonable attorney fees and witness fees if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith; asserted a claim or defense that is frivolous and that is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the court. An award under this section shall be without prejudice and as an alternative to any claim for sanctions that may be asserted under the rules of civil procedure. Nothing herein shall authorize the award of costs, disbursements or fees against a party or attorney advancing a claim or defense unwarranted under existing law, if it is supported by a good faith argument for an extension, modification, or reversal of the existing law.

Laws 1978, c. 738, § 5, eff. April 5, 1978. Amended by Laws 1982, c. 601, § 2; Laws 1986, c. 455, § 83.

RULE 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.